SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/205/2023
Hearing Date: 9th July, 10th July, 11th July 2024
Post-hearing submissions received on:
30th August, 6th September, 10th September 2024
Date of Judgment: 12th December 2024

Before

THE HONOURABLE MR JUSTICE BOURNE
UPPER TRIBUNAL JUDGE STEPHEN SMITH
SIR STEWART ELDON

Between

H6
(ANONYMITY ORDER IN FORCE)

Applicant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr H. Southey KC and Catherine Arnold (instructed by **Lewis Silkin**) appeared on behalf of the Applicant

Mr R. Dunlop KC and Ms N. Parsons (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr J. Kinnear KC and Mr D. Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1. This is the decision of the Commission to which we have all contributed.

2. The Applicant applies to the Commission under section 2C of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") for a review of a decision by the Secretary of State for the Home Department ("the SSHD") to exclude him from the UK on the basis that exclusion was conducive to the public good on grounds of national security.

3. At the beginning of the hearing the Commission excluded the public at the Applicant's request for some matters to be dealt with in private. Mr Southey KC submitted on his behalf that there were two aspects of this case in relation to which the evidence and argument should not be dealt with in public and that protective orders were needed.

4. The first was an aspect which the Commission ruled could be pursued in a different way and not in these proceedings. No further order was needed in that regard.

5. The second involved witness evidence which the Applicant proposed to adduce from a Mr Dominic Hampshire. The Commission proposed to deal with the submission by making a temporary reporting restriction with further argument to follow. The Applicant then decided not to rely on the evidence of the witness. In those circumstances the Commission decided that the only order needed was that no document on the OPEN court files should be disclosed to any person without an order of the Commission. The terms of that order were then agreed.

Post-hearing submissions

6. On 23 and 31 July 2024 respectively, the Court of Appeal handed down judgment in *R (oao Northumbrian Water Limited) v Water Services Regulation Authority* [2024] EWCA Civ 842 and *B4 v Secretary of State for the Home Department* [2024] EWCA Civ 900 ("*B4 CA*"). The Commission gave directions permitting the Secretary of State and the Applicant to make OPEN submissions addressing the impact, if any, of those judgments on their submissions in this matter. We are grateful to Mr Southey and Ms Arnold for their post-hearing submissions dated 30 August and 10 September 2024 (the latter by way of a Reply), and to Mr Dunlop KC and Ms Parsons for their submissions on behalf of the Secretary of State dated 6 September 2024. We will incorporate references to the parties' post hearing submissions where appropriate throughout this judgment. We have not found it necessary to read the CLOSED judgment of the Court of Appeal in *B4*.

Factual background (based on OPEN material)

7. The Applicant, a Chinese national, was born on 21 March 1974 and is now aged 50. He studied at university in China and then worked as a junior civil servant in China for some years. In 2002 he came to the UK to study, hoping to advance his career. Having studied language in London for one year, he took a master's degree in Public Administration and Public Policy at the University of York. According to his evidence, having originally intended to return to China to advance his career in the public sector there, he perceived opportunities for activity bridging the gap between China and the UK. In 2005 he founded a company in this country, B Ltd, which initially provided travel services. Since at least that time, he has divided his life between the two countries. On 21 May 2013 he was granted indefinite leave to remain in the UK ("ILR").

8. In May 2020 B Ltd, which by now had expanded its activities into various new areas, changed its name to A Ltd. According to the Applicant, most of its revenue comes from advising and consulting with UK-based companies on their affairs in China.

9. The Applicant has stated that, until the Covid pandemic, he spent on average 1-2 weeks in the UK each month, and he considers the UK to be his "second home".

10. On 6 November 2021 the Applicant was subject to a port stop under Schedule 3 of the Counter-Terrorism and Border Security Act 2019. He surrendered digital devices including his mobile telephone and a download of data from them was retained. The devices themselves were returned to him on 10 November 2021.

11. On 15 February 2022 the Applicant lodged a challenge against the retention of the copy data to the Investigatory Powers Commissioner's Office ("IPCO"). A Judicial Commissioner initially directed that the copies be destroyed but, on appeal, the Investigatory Powers Commissioner allowed them to be retained. That decision was notified on 25 May 2022. During that litigation the Applicant was informed that he was believed to be associated with an arm of the Chinese State known as the United Front Work Department ("UFWD").

12. On 16 February 2023 the Applicant was "off-boarded" from a flight from Beijing to London and was told that the SSHD was in the process of making a decision to exclude him from the UK.

13. On 9 March 2023 the Applicant's solicitors sent a Pre-Action Protocol letter requesting disclosure of the allegations considered to be the basis for exclusion and an opportunity to make representations prior to any decision.

14. On 15 March 2023 the Home Secretary directed that the Applicant would be excluded from the UK on the ground that his exclusion from the UK would be conducive to the public good, under Part 9.2.1 of the Immigration Rules (HC 395), and therefore that his ILR would be cancelled under Part 9.2.2. That decision ("the March decision") was notified to him by a letter dated 23 March 2023.

15. On 4 April 2023 the Applicant submitted an application to the Commission for review, setting out grounds complaining that the decision was unlawful and that the procedure had been unfair. On 15 May 2023, following an indication that the SSHD would reconsider the decision, the Commission granted a temporary stay of proceedings.

16. On 1 June 2023 the Applicant submitted written representations and a witness statement for the SSHD to take into account in the reconsideration.

17. On 11 July 2023 a submission was prepared for the SSHD recommending that the exclusion decision should be maintained. The submission noted that, in addition to material which was taken into account before the March decision, regard had now also been had to representations made by the Applicant in the legal proceedings before IPCO. The submission referred to the following assessments:

    (1) The Director General of M15 had highlighted the threat posed to the UK by political interference activity conducted by the Chinese State, where Chinese intelligence or bodies within the Chinese Communist Party ("CCP") such as

the UFWD were "mounting patient, well-funded, deceptive campaigns to buy and exert influence".

(2) The Applicant had been in a position to generate relationships between prominent UK figures and senior Chinese officials that could be leveraged for political interference purposes by the CCP (including the UFWD) or the Chinese State.

(3) Data obtained during the schedule 3 examination on 6 November 2021 indicated that a letter was sent by a Mr Dominic Hampshire, who was a senior adviser to Prince Andrew, Duke of York ("the Duke"), to the Applicant confirming that the Applicant could act on behalf of the Duke in engagements with potential partners and investors in China. It was assessed that this demonstrated that the Applicant was in a position to generate relationships between senior Chinese officials and prominent UK figures which could be leveraged for political interference purposes by the Chinese State.

(4) The Applicant had not provided a full and open account of his relationship with the Duke, which had a "covert and clandestine" element.

(5) In his witness statement of 1 June 2023 the Applicant had downplayed his links with the UFWD which, combined with his relationship with the Duke, represented a threat to national security.

(6) Another document obtained during his schedule 3 examination contained questions posed by the Chinese Embassy regarding strategy.

(7) The Applicant had sometimes deliberately obscured his links with the Chinese State, the CCP and the UFWD.

(8) Evidence obtained during his schedule 3 examination also included a letter on his device addressed to the Beijing UFWD, a list of people travelling in a delegation including a UFWD member and members with job roles listed as both UFWD and the Beijing Overseas Friendship Association, and a text message from the Applicant introducing himself as an overseas representative of the Chinese People's Political Consultative Conference ("CPPCC") which is a political advisory body that is central to the CCP's United Front system.

(9) In his schedule 3 interview the Applicant said that he avoids getting involved in politics and has no connections to anyone in politics in China, but the evidence referred to above indicated that he was frequently connected to officials associated with the Chinese State.

(10) His further representations said he had only limited links to the Chinese State, had never been a senior member of the CCP and had not carried out activities on behalf of the UFWD or CCP. His statement asserted that exclusion was damaging his business and his business provided significant economic benefits to the UK.

(11) Although the Applicant said in his statement that "contact with the UFWD is unavoidable", he had links beyond those outlined in the statement and had not provided a full and open account of them.

(12) Although the Applicant denied receiving any instructions from UFWD to interfere with UK interests, it was assessed that those in his position could be expected to understand UFWD and CCP objectives and proactively engage in them without being tasked. It was also thought unlikely that he had fully disclosed his UFWD links to his UK contacts, indicating a "deceptive element" to his activity.

(13) The Applicant was an Honorary Member of the 48 Group Club which has a number of prominent UK figures as members, who could be leveraged for political interference purposes by the Chinese State.

18. The submission also noted a requirement of the SSHD's exclusion policy that exclusion must be proportionate to the threat that an individual poses to the UK. The assessment was that exclusion was the most effective means of mitigating the threat posed by the Applicant and that it was proportionate in the light of that threat.

19. Under the heading "ECHR Considerations", the submission adopted a primary position that the ECHR was not engaged because the Applicant was outside the UK. It also contained an assessment, in the alternative, that his exclusion was necessary and proportionate in pursuit of the legitimate aim of protecting national security, justifying any interference with his Article 8 rights. He had no family in the UK. Any interference with his business interests was limited because they could be maintained from overseas. The submission accepted that his business in the UK may have had a positive benefit for the UK and noted his evidence that his work and private life were intertwined and that he wished to access better quality medical care for diabetes in the UK, but these matters did not outweigh national security.

20. On 14 July 2023 the SSHD decided to maintain the decision to exclude the Applicant from the UK and to cancel his ILR on the basis that his presence in the UK was not deemed to be conducive to the public good on the ground of national security ("the July decision").

21. The July decision was notified to the Applicant by a letter dated 19 July 2023 which stated:

> "The Home Secretary has upheld her previous decisions to exclude you from the UK and to revoke your Indefinite Leave to Remain in the UK, on the basis that your presence in the UK is not deemed to be conducive to the public good.
>
> We have reason to believe you are engaging, or have previously engaged, in covert and deceptive activity on behalf of the United Front Work Department (UFWD) which is an arm of the Chinese Communist Party (CCP) state apparatus. The UFWD is reported to have a remit to engage in political interference, including targeting the UK's democratic processes. As such, we therefore assess that you are likely to pose a threat to UK national security."

22. On 5 August 2023 the Applicant submitted his new application for review under section 2C.

Legal Framework

Section 2C of the 1997 Act: review of certain exclusion decisions

23. Section 2C of the 1997 Act provides, where relevant:

> "(1) Subsection (2) applies in relation to any direction about the exclusion of a person from the United Kingdom which –
>
> (a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the person is conducive to the public good,
>
> (b) is not subject to a right of appeal, and
>
> (c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public –
>
> (i) in the interests of national security…
>
> (2) The person to whom the direction relates may apply to the Special Immigration Appeals Commission to set aside the direction.
>
> (3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.
>
> […]
>
> (5) References in this section to the Secretary of State are to the Secretary of State acting in person."

Part 9 of the Immigration Rules: grounds for refusal

24. The Immigration Act 1971 ("the 1971 Act") makes provision concerning the Secretary of State's regulation of the entry, residence and exclusion of those subject to immigration control. Section 3(2) obliges the Secretary of State to lay before Parliament statements of the rules, and changes to the rules, to be followed in the administration of immigration control.

25. The *Statement of Changes in Immigration Rules* (HC395) makes such provision, as amended from time to time. Part 9 of the Immigration Rules, in the version applicable to the exclusion of the Applicant, makes provision for general grounds of refusal, both discretionary and mandatory. Part 9.2.1. provides:

> "9.2.1. An application for entry clearance, permission to enter or permission to stay must be refused where:
>
> (a) the Secretary of State has personally directed that the Applicant be excluded from the United Kingdom;

(b) the applicant is the subject of an exclusion order; or

(c) the applicant is the subject of a deportation order, or a decision to make a deportation order."

26. Part 9.2.1.(a) is not the source of the Secretary of State's power to direct a person's exclusion from the United Kingdom. Rather Part 9.2.1.(a) recognises the separate existence of such a power, and mandates the refusal of any future application for entry clearance, permission to enter or permission to stay made by an individual (such as the Applicant) who is the subject of such a decision taken personally by the Secretary of State. The power to exclude arises under the Royal Prerogative.

The Secretary of State's operational guidance *Exclusion from the UK*

27. The Secretary of State has issued operational guidance to her officials concerning the use of exclusion powers. The operational guidance, *Exclusion from the UK*, is outlined in further detail below. The policy in force at the time of the March and July decisions was version 5.0, published on 26 November 2021. We were also taken to the current version, version 7.0, dated 12 March 2024. We summarise the relevant contents of the guidance to the extent necessary, below.

European Convention on Human Rights

28. The European Convention on Human Rights ("the ECHR") is engaged on a territorial basis. See Article 1:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

29. Article 8 provides:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Equality Act 2010

30. Section 13 of the Equality Act 2010 ("the 2010 Act") defines direct discrimination. It provides, where relevant:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> [...]

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others."

31. Section 19 of the 2010 defines indirect discrimination. It provides, where relevant:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B does not share the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant characteristics are –

…race…"

32. Section 9(1)(b) defines "race" to include nationality.

33. Section 29 (provision of services) provides, where relevant:

"(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

[…]

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

[…]

(9) In the application of this section, so far as relating to race, religion or belief, to the granting of entry clearance (within the meaning of the Immigration

Act 1971), it does not matter whether an act is done within or outside the United Kingdom.

[…]"

34. Section 149 (public sector equality duty) provides, where relevant:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to –

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance quality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

[…]

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(d) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

[…]"

The proceedings in SIAC

The Applicant's OPEN case

35. Mr Southey (leading Catherine Arnold), representing the Applicant, began by reminding the Commission of some of the salient facts.

36. His starting point was that the relationship between the UK and China is and has been complex. During some periods, contact between Chinese businesspeople and the UK establishment has been encouraged as being in the UK's interests. That has changed in recent years.

37. There is also evidence that it is difficult for a Chinese national in business to avoid any contact with the CCP. That point was made in an article dated 31 July 2022 by Lord Wei of Shoreditch, responding to allegations of having met with Chinese people and organisations some of which may have had links with the UFWD and the Chinese government.

38. The SSHD's Amended First Statement in these proceedings, originally dated 19 December 2023 and amended on 29 April 2024, noted the view of the DG of MI5 that "much influencing activity is wholly legitimate" and contrasting that with interference activity described as "influencing that is clandestine, coercive or corruptive".

39. In the present case Mr Southey complains of a lack of clarity as to what activity will fall on which side of that line.

40. Mr Southey also points to the paucity of information provided to the Applicant during these proceedings. The Applicant does not know why the port stop occurred in November 2021. When he made his representations against exclusion and first witness statement, the documentary evidence obtained during the port stop had not been disclosed to him. Nevertheless, aspects of the representations and witness statement were held against him in the 11 July decision. He was given only about 3 weeks to prepare the representations and first witness statement. All that he was told was what was contained in the decision letter dated 23 March 2023, which just said:

> "… your exclusion from the UK is conducive to the public good.
>
> We have reason to believe you are engaging, or have previously engaged, in covert and deceptive activity on behalf of the United Front Work Department (UFWD) which is an arm of the Chinese Communist Party (CCP) state apparatus. The UFWD is reported to have a remit to engage in political interference, including targeting the UK's democratic processes. As such, we therefore assess that you are likely to pose a threat to UK national security."

41. There was no hint of what the "covert and deceptive activity" might consist of. It did not make the references now seen in OPEN material about forming relationships with prominent UK figures which might be leveraged for the purpose of political interference.

42. The opportunity to make representations was given by a letter from the Government Legal Department on 9 May 2023, which also did not contain any additional reasoning.

43. In the submission to the SSHD on 11 July 2023, regard was had to more material than had been taken into account on 10 March 2023. This included the representations which the Applicant had made in the legal proceedings before the IPC. In the reasoning, use was made of evidence such as the letter from Mr Hampshire referred to at paragraph 17(3) above, without any notice to the Applicant that this was being relied on. Mr Southey points out that there was no discussion of the value to the UK of the Applicant's business activity. Under the heading "Proportionality" in the assessment of the case by the relevant Home Office team, it was rightly stated (by reference to the SSHD's policy on exclusion) that a decision to exclude must be proportionate to the threat that the

individual poses to the UK. However, there was no reference to any balancing of factors for and against exclusion.

44. Mr Southey emphasized the value to the UK of some of the Applicant's activities. A Ltd supported China Minsheng Investment Group in investing in the UK market. It provided consultancy services to assist McLaren Automotive to introduce its high-end road car brand into the China market. It offered strategic counsel and analysis services to Glaxo SmithKline when it was undergoing a whistleblowing investigation in China. These activities, among others, have boosted investment and employment in both countries, but consideration does not appear to have been given to that fact in the Applicant's favour.

45. From that factual platform, Mr Southey contended that:

(1) the procedure adopted in the decision under challenge was unfair;

(2) the SSHD breached the *Tameside* duty of enquiry;

(3) the decision was unreasonable and/or disproportionate contrary to domestic law because the SSHD could not show that she had sufficient material to justify it;

(4) the decision was unlawful because of the absence of guidance or any other source of law specifying the circumstances in which the SSHD's exclusion power would be exercised;

(5) the decision violated the Applicant's right to respect for his private life under Article 8 ECHR;

(6) the decision amounted to unlawful discrimination contrary to the Equality Act 2010 and/or Article 14 ECHR and/or the common law;

(7) The briefing given to the SSHD amounted to a violation of the public sector equality duty under section 149 of the Equality Act 2010.

(1) Procedural unfairness

46. Mr Southey submitted that procedural unfairness arose from a number of facts which, considered cumulatively, prevented the SSHD from carrying out a full merits-based consideration of the Applicant's case and/or a full proportionality analysis before the July decision, rendering the whole process unfair.

47. The role of a Court (in this case the Commission), he submitted, is not merely to review the reasonableness of a decision maker's view of what fairness required but to determine for itself whether a fair procedure was followed: see *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 at [65] per Lord Reed.

48. As to the requirements of fairness, Mr Southey relied on *R (Balajigari) v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647 where Underhill LJ said at [60] that unless the circumstances of a case make it impractical (and any contention to that effect must be closely examined), the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural

fairness, not least because the decision maker may "unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come". Mr Southey points out that the March exclusion decision was taken without any representations from the Applicant despite his having requested the opportunity when told that exclusion was under consideration. And, since the Applicant was told that exclusion was under consideration, it cannot be suggested that allowing him to make representations would have had some tipping-off effect which would frustrate the exclusion process. He was already effectively prevented from travelling to the UK by being made subject to the "Authority to Carry" ("ATC") scheme (a scheme requiring carriers such as airlines to seek authority from the Secretary of State to carry persons on aircraft, ships or trains which are arriving (or expected to arrive) or leaving (or expected to leave) the UK) which caused the Applicant to be taken off his flight on 16 February 2023.

49. This, Mr Southey submitted, increased the importance of having a sufficient review process before the July exclusion decision was taken, not least to avoid any sense that the second decision would simply rubber stamp the first. And if it were genuinely not practical to give the Applicant notice of the material underlying the proposal to exclude and seek his comments on it, that strengthened the value of seeking further information from other sources (for example, Mr Hampshire). That point was also relevant to ground (2), the *Tameside* challenge.

50. Mr Southey further submitted that the unfairness arising from the Secretary of State's failure to seek representations from the Applicant was compounded by the non-disclosure of a range of previously CLOSED materials to him at the time, in circumstances when those materials are now in OPEN pursuant to the rule 38 process. The materials could and should have been disclosed to the Applicant before the March decision and certainly before the July decision. Had the Secretary of State done so, any representations made by the Applicant ahead of the either decision being taken would have been informed by any explanation he had available to him at the time.

51. Mr Southey acknowledged that that submission was contrary to the position adopted by Johnson J at paragraph 75 of *L3 v Secretary of State for the Home Department* (SC/144/2017), which we quote at paragraph 99, below.

52. Recognising the contrary thrust of this aspect of *L3*, Mr Southey submitted that it was wrongly decided and invited us not to follow it. The question, he submitted, was whether the Secretary of State acted fairly. The late disclosure of material that could have been disclosed all along, in circumstances when there was no sufficient ability to make representations ahead of the decision was, in his submission, a paradigm example of unfairness.

53. Mr Southey also criticised the contents of the briefing to the SSHD ahead of the July decision, which he says was unbalanced by failing to identify any aspects of the case which were in the Applicant's favour. He cited *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) where the Divisional Court held that, before the Secretary of State could refuse to release a prisoner on parole, fairness required that his officials put the issues to him in a balanced way.

54. Relying on *B4 CA* at para. 65, in his post-hearing submissions Mr Southey contended that it was for the Commission to decide for itself whether the requirements of fairness were met. For present purposes, the issue in *B4 CA* was whether a different constitution of the Commission had erred in concluding that it was not for SIAC to decide whether the process adopted by the Secretary of State, and the advice given to her, was fair and balanced. As to that issue, Singh LJ held at para. 65:

> "...the correct approach is for SIAC itself to decide whether the advice given to the Secretary of State was fair and balanced but, in performing its task, SIAC must give appropriate respect to the judgments of the experts involved, for reasons both of institutional capacity and democratic accountability. The test is not, however, one of *Wednesbury* unreasonableness."

55. Although the Commission was held to have erred by failing to determine the issue of fairness for itself, any error was immaterial. The Court of Appeal held that the advice given to the Secretary of State *was* fair and balanced (para. 71).

56. In Mr Southey's submission, the deficiencies in the process adopted by the Secretary of State as outlined above are such that, when the Commission decides for itself whether the advice given to the Secretary of State was fair and balanced, that militates in favour of the conclusion that it was not.

(2) The Tameside duty of enquiry

57. The basic principle is that, before taking a decision, decision makers must take such steps to inform themselves as are reasonable. The steps taken are reviewable on *Wednesbury* grounds. The principles set out by the Court of Appeal in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 have been summarised in repeated cases including *Balajigari* at [70]. Mr Southey emphasized that a decision maker may have to consult outside bodies with a particular knowledge or involvement in the case in order to be able to reach a rational conclusion, and that the wider the discretion conferred on decision makers, the more important it is that they have all the relevant material.

58. Mr Southey acknowledged that this ground overlaps with ground (1). His core submission was that if the SSHD had good reason for not seeking the Applicant's representations on the relevant material, she was required to ask herself how that gap should be filled. This was in the context of a decision with serious consequences for the individual and where the SSHD's policy recognised the need for caution in cases where the basic facts are not proved by an authoritative document such as a criminal record.

(3) Rationality of the decision

59. This ground also overlaps with the *Tameside* ground. Mr Southey submitted that the well-recognised rationality category of a demonstrable flaw in the decision maker's reasoning can be seen in the failure to consider whether other sources of information could be sought, given the SSHD's position that the Applicant could not be invited to comment on the material on which the decision was based.

60. Whilst he could of course comment only on the OPEN case, Mr Southey drew a contrast between the relevant conduct by the Applicant that is relied on in OPEN, i.e. forming

business relationships with figures including the Duke, and what is identified in the SSHD's policy as the sort of conduct that may lead to exclusion, which is broadly criminal conduct.

61. By reference to *R (Begum) v SIAC* [2021] UKSC 7, [2021] AC 765 ("*Begum SC*"), Mr Southey acknowledged that when judging rationality, the Commission will accord proper respect to the SSHD's assessment for reasons both of institutional capacity and of democratic accountability. Nevertheless, the cases make clear that the rationality of decisions is subject to review and that review applications are not bound to fail. A lack of anything indicating a violation by the Applicant of any standard set by published policy is, he submitted, a first point on rationality.

62. Mr Southey further submitted that there was a lack of sufficient connection between the exclusion measure and its aim. The business activities of the Applicant and of A Ltd are continuing.

63. A third point made by Mr Southey was a lack of OPEN evidence of any consideration being given by the SSHD to the impact of exclusion on the Applicant.

(4) Lack of lawful policy guidance

64. Mr Southey relied on *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245 for the proposition that, for the lawful exercise of a discretionary power with a significant impact on the rights and freedoms of the individual, "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised" ([34] per Lord Dyson). The examples given there were arrest, surveillance and immigration detention powers. In the field of immigration powers more generally, section 3(2) of the 1971 Act requires these to be set out in Immigration Rules.

65. Mr Southey submitted that the guidance in *R (A) v SSHD* [2021] UKSC 37, [2021] 1 WLR 3931 concerning the criteria for determining whether a policy is unlawful did not address scenarios of the sort that were before the Supreme Court in *Lumba* or that is before the Commission in the present proceedings. In Mr Southey's submission, it was significant that *Lumba* concerned the Secretary of State's exercise of immigration detention powers. Such powers exist within a broader framework of immigration control, central to which is the Secretary of State's statutory duty to make rules "as to the practice to be followed in the administration of this Act" (section 3(2), 1971 Act). That statutory context throws the guidance in *R (A)* into sharp relief, especially given *R (A)* was only a five-judge court, whereas *Lumba* was heard by a panel of nine Supreme Court justices. Mr Southey also submitted that the court in *R (A)* appeared not to have considered *Lumba* or otherwise heard argument in relation to it.

66. One issue in *Northumbrian Water Limited* was whether a decision taken by the Water Services Regulation Authority ("Ofwat") in relation to an exemption from certain guidance applicable to the appellant water company was unlawful on account of Ofwat's alleged failure to adopt a policy setting out how it would exercise its discretion under the relevant guidance. Lewis LJ held that the impugned decision was not rendered unlawful by the absence of a policy addressing the discretionary decision under challenge.

67. Mr Southey addressed the import of *Northumbrian Water Limited* in two ways. First, to the extent it concluded that there was no general common law duty to adopt a policy, while binding on this Commission, it was wrongly decided. Secondly, properly understood, the Applicant's case may be distinguished from the scenarios addressed by the Court and the authorities there addressed. The Applicant will suffer "penalties or other detriments" (in the words of Lord Dyson JSC at para. 36 of *Lumba*) pursuant to the Secretary of State's decisions to exclude him. That being so, his situation bears analogies with *Lumba* such that the omission of a specific policy addressing the use of the Secretary of State's exclusion powers is a further basis upon which the decisions are unlawful.

68. The policy in place at the time of both exclusion decisions was *Exclusion from the UK*, Version 5.0 published on 26 November 2021. That document stated that the exclusion power "is normally used in circumstances involving national security, criminality, international crimes… corruption, unacceptable behaviour and in limited circumstances, sham marriage".

69. The section entitled "National security" reads:

> "National security threats will often be linked to terrorism. Terrorist activities are any act committed, or the threat of action designed to influence a government or intimidate the public, and made for the purposes of advancing a political, religious or ideological cause and that:
>
> - involves serious violence against a person
> - may endanger another person's life
> - creates a serious risk to the health or safety of the public
> - involves serious damage to property
> - is designed to seriously disrupt or interfere with an electronic system."

70. The section entitled "Unacceptable behaviour" reads:

> "Unacceptable behaviour covers any non-UK national whether in the UK or abroad who uses any means or medium including:
>
> - Writing, producing publishing or distributing material
> - Public speaking including preaching
> - Running a website
> - Using a position of responsibility such as a teacher, community or youth leader
> - to express views which:
> - Provoke, justify or glorify terrorist violence in furtherance of particular beliefs
> - Seek to provoke others to terrorist acts

- Provoke other serious criminal activity or seek to provoke others to serious criminal acts
- Foster hatred which might lead to inter-community violence in the UK

This list is indicative rather than exhaustive."

71. The Commission was also shown version 7 of the policy which was published on 12 March 2024. It is in similar but slightly broader terms.

72. Mr Southey submitted that the policy gives the impression that, to lead to exclusion, conduct must be at least close to the borders of criminal conduct. There is otherwise no clear indication of where the line is drawn, and no reference to conduct of the kind alleged against the Applicant in OPEN. That, he contends, made the decision unlawful.

73. Mr Southey also challenged the compliance by the decision in the present case with requirements of the policy that a recommendation to exclude an individual must be based on reliable evidence (giving the example of criminal record checks) and, where the evidence is not so straightforward, a "greater degree of scrutiny and assessment may be required", and that:

> "An exclusion decision must be reasonable, consistent with decisions taken in similar circumstances, and proportionate to the threat they pose to the UK. There must also be a rational connection between exclusion of the individual and the legitimate aim being pursued, for example safeguarding public security or tackling serious crime."

(5) ECHR Article 8

74. Anticipating Mr Dunlop's primary ECHR submission that the Convention is not engaged in relation to the Applicant's private life since he is outside the UK's territorial ECHR jurisdiction, Mr Southey submitted that Article 8 is engaged in this case because of the impact of exclusion on the Applicant's pre-existing, UK-based private life. Although he has no family in the UK, he makes (or made, until interrupted by the Covid pandemic and subsequent exclusion) frequent trips to this country which is his second home and where he mingles business and social activities. It also affects his reputation in the UK because exclusion carries a clear implication of having engaged in unacceptable conduct, and those close to him will become aware that he can no longer travel to the UK.

75. If Article 8 is engaged then, Mr Southey submitted, the interference with it was, first, not "in accordance with the law", because of the lack of accessible guidance on when the policy would foreseeably be exercised. This, he added, was all the more important in the case of a decision which was subject only to review by the Commission and not to any appeal on the merits.

76. Mr Southey's second point under Article 8 was that the decision did not satisfy the requirement of proportionality. The evidence did not show that the SSHD had properly balanced the factors for and against exclusion. Even where decision makers are better placed than a Court to assess the factors for and against the decision, their views will

carry less weight where they have not carried out the necessary balancing act: see *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [37].

(6) Discrimination

77. Mr Southey drew the Commission's attention back to the requirement of the SSHD's policy that cases be decided consistently. He also repeated his complaint of a lack of clear criteria for exclusion decisions, at least in a case like that of the Applicant.

78. In the circumstances and on the basis of the OPEN material, Mr Southey invited us to draw the inference that in arriving at the July decision, the SSHD discriminated against the Applicant on the ground of his Chinese nationality.

79. If the decision was within the ambit of his Article 8 rights, then that would infringe ECHR Article 14 which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,"

80. Further or alternatively, Mr Southey submitted, the Applicant's treatment amounted to direct discrimination contrary to section 13 of the Equality Act 2010. Mr Southey highlighted the Secretary of State's approach to the Applicant's membership of the 48 Group Club in the July decision. Since there was no suggestion that the activities of the 48 Group Club were themselves unlawful, that the organisation itself was unlawful or that it its other participants were engaged in unlawful activities on account of their association with the organisation, it necessarily followed that the Secretary of State's concerns about the Applicant's involvement with the organisation were attributable to the Applicant's Chinese nationality and the group's relationship with the Chinese State. In Mr Southey's submission, it was the Applicant's nationality, and the Secretary of State's overall approach to Chinese citizens, that was the true, and therefore discriminatory, motivating factor in her decision to exclude the Applicant. Such inferences from association with the Chinese State, as opposed to other states, underlined the importance of a clear exclusion policy on the part of the Secretary of State, Mr Southey submitted. In the absence of the clarity such a policy could bring, discrimination based on race and nationality was (i) enabled, and (ii) not justified.

81. Mr Southey further submitted that the Secretary of State's decisions were contrary to Article 14 ECHR, read with Article 8 ECHR. As observed in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 at paragraph 66, for the purposes of Article 14 the "ambit" of the relevant substantive provision of the Convention is broader than the scope of the article in question. Any territorial barrier the Applicant would otherwise face in his reliance upon Article 8 thus falls away insofar as he is the victim of discrimination.

82. In Mr Southey's submission, therefore, whether viewed through the lens of sections 13 or 19 of the 2010 Act, or by reference to Article 14 ECHR within the ambit of Article 8, the Applicant has been the subject of discrimination on the grounds of his nationality.

83. Mr Southey also submitted that the prohibition contained in section 29 of the 2010 Act, prohibiting discrimination by service providers in their provision of a service to the public, was engaged in the circumstances of the Applicant's exclusion. Section 29 should be given a broad application. It was not to be read or applied literally. To the extent that the Commission held otherwise in *D9 v SSHD* (SC/180/2021), it was wrong to do so; an exclusion decision plainly concerned "the granting of entry clearance", in the sense addressed by the Court of Appeal in *Turani v Secretary of State for the Home Department* [2021] EWCA Civ 348. Moreover, the Commission in D9 reached its conclusion without the benefit of the Court of Appeal's recent judgment in *Ali v Upper Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department* [2024] EWCA Civ 372. *Ali* decided that the circumstances of a settled migrant with indefinite leave to remain in the United Kingdom were capable of engaging Article 8 ECHR, even where the individual concerned was outside the jurisdiction.

(7) Public sector equality duty

84. The March and July OPEN submissions to the Secretary of State contained the following identical wording, at paragraphs 9 and 6 respectively, concerning the public sector equality duty contained in section 149 of the 2010 Act:

> "The relevant HO team do not consider that your duties under section 149 Equality Act 2010 require you to take account of any additional information. Whilst a decision to continue to exclude [the Applicant] will have an impact on him, this decision is due to the assessment that his presence in the UK poses a risk to national security. Furthermore, this decision is applicable only to [the Applicant] and would therefore not have a differential impact on groups with protected characteristics."

85. Mr Southey submitted that the above advice to the Secretary of State violated the public sector equality duty.

86. First, Mr Southey submitted that since section 29(6) of the 2010 Act was engaged, it followed that section 149 was engaged also.

87. Second, it was "plainly wrong" to advise the Secretary of State that the decision in question was only applicable to the Applicant. The decision to pursue the Applicant's exclusion was attributable to the Secretary of State's broader discriminatory practice of targeting of Chinese people. The discriminatory approach to the individual decision in the Applicant's case (as pleaded under ground 6) threw the Secretary of State's approach to the section 149 duty into sharp relief.

88. Third, this approach finds support in the approach of the Supreme Court in *R (Marouf) v Secretary of State for the Home Department* [2023] UKSC 23, [2023] 3 WLR 228. In the course of holding, at paragraph 54, that there was no general duty under section 149 to attempt to bring about change in countries outside the United Kingdom, Lady Rose implied that it is open to persons *who do* have a pre-existing connection to the United Kingdom to rely on the duty to challenge a decision of a public body on section 149 grounds:

> "There is no general duty under section 149 on public bodies to attempt to bring about that kind of change in countries outside the United Kingdom and it is not open to a person with a protected characteristic but no connection to the United Kingdom to challenge a decision of a public body on the grounds that a policy adopted failed to have due regard to the need to improve their position within that overseas community…"

89. In contrast to those with "no connection to the United Kingdom", the Applicant does have such a connection, Mr Southey submitted. The Secretary of State's policy plainly targeted Chinese nationals, such as the Applicant, and had a differential impact in relation to them.

The Secretary of State's OPEN case

90. We here set out the responses of the SSHD, represented by Mr Dunlop and Ms Parsons, to each of the grounds put forward by Mr Southey, followed by points made by Mr Southey in reply.

(1) Procedural unfairness

91. Mr Dunlop invited the Commission to look at the question of fairness in the round, assessing the process and the proceedings as a whole.

92. In particular he submitted that any legal defects in the March decision are of no relevance to the lawfulness of the July decision. He cited the Court of Appeal's decision in *Caroopen v SSHD* [2016] EWCA Civ 1307, [2017] 1 WLR 2339 at 2354 (quoting with approval the words of UTJ Jordan in *Kerr v SSHD* [2014] UKUT 493 (IAC)), explaining that a fresh decision may prospectively fill the gap which would arise if an earlier decision were to be quashed, removing the need for a remedy for the earlier unlawfulness.

93. Mr Dunlop rejected the concern about decision makers potentially being unwilling to change their mind. Exclusion decisions are made by the SSHD personally, so there can be no question of having a different decision maker on the second occasion. In the present case there is no evidence of the SSHD having a closed mind.

94. Since the Applicant was given the opportunity to make representations before the July decision, Mr Dunlop submits that his objection to the lack of such opportunity before the March decision is academic.

95. Also, there is no common law requirement to give such an opportunity, or to give advance disclosure of the material relied on in support of the decision, in the type of case where tipping off the individual could undermine the purpose of the exclusion direction, of protecting national security. That was recognised by the Commission in another exclusion case, *T2 v SSHD* (SN/29/2016) where Laing J said at [57]:

> "We accept the Secretary of State's submission that where such a decision is based on considerations of national security, and is certified under section 2C of the 1997 Act, it is not unfair if the material relied on is not disclosed before the decision is made. Equally, when prior notification risks frustrating the purpose for which the decision is to be made, such notification is not required."

96. A similar approach was taken by the Court of Appeal in *Begum v SSHD* [2024] EWCA Civ 152, [2024] HRLR 5 (*"Begum CA")*, a deprivation of citizenship case. The judgment of the Court at [107] recognised a general rule in national security cases, where seeking representations would itself be contrary to national security.

97. Nor did the SSHD's policy require an opportunity for representations or any advance disclosure, being silent on the subject. The more recent iteration of the policy makes the position explicit by requiring officials to consider whether it is "possible or appropriate" to invite representations or whether this would "defeat the purpose of exclusion".

98. Nor, Mr Dunlop submitted, was there merit in Mr Southey's reliance on the protective effect of the ATC scheme, because that scheme does not provide the same level of protection as an exclusion direction. It was rationally open to the SSHD to conclude that advance disclosure of any further information to the Applicant would be potentially harmful to national security.

99. Mr Dunlop further submitted that in view of the lack of any general duty to invite representations or give advance disclosure, Mr Southey could not show that there was a duty to give any particular level of advance disclosure or that the information provided to the Applicant was insufficient. He relied on the Commission's decision in another exclusion case, *L3 v SSHD* (SC/144/2017). Relevant information emerged in the course of the rule 38 process in SIAC which the Applicant contended should have been disclosed to him before the exclusion direction was made. Rejecting that submission, Johnson J said at [75]:

> "SIAC has granted permission for the evidence to be withheld on the grounds that disclosure would be contrary to the interests of national security. The Secretary of State considered that disclosure of the allegation would likewise be damaging to the interests of national security. That was a genuine and rational view, which justified not providing L3 with an opportunity to make representations on that particular issue. That is so even though, in the event and with the involvement of the Special Advocates, the Secretary of State has ultimately agreed to disclose the basic allegation that is made. The statutory framework which regulates these judicial review proceedings contemplates that information that is relevant to the decision will be disclosed only in the course of the proceedings. That does not mean that the decision itself was unfair. There is no unfairness if the information is initially withheld in the genuine belief that disclosure would be damaging to the interests of national security but is then subsequently disclosed – see *Farooq v SSHD* (SN/7/2014 and SN/8/2014). That is what has happened here."

100. On the facts of this case, Mr Dunlop pointed out that at all material times the Applicant knew that the contents of his devices had been downloaded at the time of the 2021 port stop. The letter of 23 March 2023 told him that he was accused of covert and deceptive activity on behalf of the UFWD. His devices had been returned to him and he could have examined his own data for any material relevant to that allegation and responded to it in detail. He chose not to do so, although his first witness statement showed that he appreciated the relevance of his relationship with the Duke.

101. Mr Dunlop resisted the contention that the submission to the SSHD was not balanced. It made reference to the Applicant's private life and to the possible benefits of his business activity to the UK.

102. Meanwhile he submitted that the requirements of fairness are always context-specific and so cases from a different context like *Hindawi* are of no particular assistance. Following the approach of the Supreme Court in *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52, [2021] 2 All ER 967 (at [116]-[120] per Lord Hodge and Lord Sales), where the relevant statute did not mandate consideration of any specific factor (which the 1997 Act does not), it was for the SSHD to decide what were the relevant considerations, subject only to *Wednesbury* review.

103. In reply, Mr Southey emphasized that although the Applicant was in possession of the material downloaded at the port stop when he drafted his first witness statement and representations, he had not been given any indication that that or any other material was the reason for the proposed exclusion. We do not know how much data he would have had to review in the short time given to him. And although he referred to the Duke in his statement, he had no idea what if any aspect of the relationship was relevant.

104. Mr Southey further submitted that whilst unfairness in a first decision can in principle be cured by a fair second decision, that did not happen in this case because of the combination of the flaws in the first decision and the evidence from which it can be inferred that the second was taken with a closed mind.

105. He also submitted that the need for representations and/or advance disclosure is greater in an exclusion case, where SIAC provides a mere review, than in a case such as *Begum* where there was a right of appeal. This, he submitted, was not a case where there was a "tipping off" problem because, by the time of the July decision, the Applicant had already been excluded from the UK. Therefore, fairness required him to be given the opportunity to make properly informed submissions.

(2) The Tameside duty of enquiry

106. As summarised by Mr Dunlop, this ground boiled down to the contention that no reasonable Secretary of State could have decided to proceed without contacting Mr Hampshire to seek his views.

107. The answer that could be given in OPEN was that it was reasonable not to seek Mr Hampshire's views, given the risk that Mr Hampshire might tip the Applicant off about any matters of significance and the lack of certainty that he would provide reliable and valuable information.

108. Mr Dunlop also submitted that, on the facts, it is possible for the Commission to conclude that consulting Mr Hampshire would not have changed the SSHD's decision. We have already referred to the application at the start of the hearing for the Commission to sit in private. That application in part concerned evidence of Mr Hampshire, which was in a statement. That statement was seen by the SSHD and has not modified her position. On the contrary, if the statement were relied on, the SSHD would contend that its contents support the view that the Applicant had not candidly disclosed his UFWD or CCP connections to Mr Hampshire or to the Duke.

109. In answer to that last point Mr Southey submitted that if regard is had to the statement despite his decision not to rely on it, then regard should be had to any exculpatory as well as inculpatory contents. His point, he said, was the simple one that in order to find out whether the Applicant had been candid with Mr Hampshire about his CCP/UFWD links, the solution was to ask Mr Hampshire.

(3) The rationality of the decision

110. Mr Dunlop submitted that the SSHD is entitled to take a precautionary approach and has a wide discretion when considering whether to make an exclusion direction. So in *L3* Johnson J said at [50]:

> "A decision to exclude a non-UK national from the United Kingdom on the grounds that their presence would not be conducive to the public good is of a different nature from a deprivation of citizenship. It does not involve the removal of any fundamental status. There is a well-established body of authority establishing that (subject to any public law constraints that are engaged, including the obligation to act compatibly with rights under the ECHR) the Secretary of State is entitled to take a precautionary approach and has a wide ambit of discretionary judgment as to the circumstances in which it would be conducive to the public good to make such a decision, particularly in the field of national security."

111. Although the direction in this case had an impact on the Applicant's status as a holder of ILR, the effect was nevertheless less fundamental than that of a deprivation of citizenship.

112. Mr Dunlop reminded the Commission that the July decision was based on assessments that (1) the Applicant had links to the Chinese State, the CCP and the UFWD and had at times deliberately attempted to obscure those links; and (2) he has been in a position to generate relationships between prominent UK officials and senior Chinese officials that could be leveraged for political interference purposes by the CCCP and/or the UFWD and/or the Chinese State.

113. Mr Dunlop submitted that the links to the Chinese authorities were demonstrated by the following OPEN material which was downloaded from the Applicant's devices during the November 2021 port stop (we are dependent on summaries as the documents are in Mandarin):

(1) A letter addressed to Zhou Kairang, a Beijing UFWD member, whose effect was summarised in the Applicant's second witness statement as "pitching" the World Chinese Entrepreneurs Convention ("WCEC") to the UFWD and presenting his and A Ltd's achievements.

(2) A list of people travelling in a delegation, including Zhou Kairang. Some of the delegation members' job roles were listed by reference to both UFWD and the Beijing Overseas Friendship Association (a local organisation of the China Overseas Friendship Association which is said to be run by the UFWD).

(3) A text message sent by the Applicant on 7 March 2019, introducing himself as a National CPPCC Overseas Representative. The CPPCC is said to be central to the United Front system.

114. Mr Dunlop submitted that the Applicant's downplaying of his links to the Chinese authorities were demonstrated by the following OPEN material which made it rational for the SSHD to conclude that he had shown a lack of honesty and candour:

(1) In his November 2021 schedule 3 interview, the Applicant said that he avoids getting involved in politics as it has no space in business and that he has no connections to anyone in politics in China. He also said that he keeps his distance from China and does things by the book so that no inference can be drawn that he is being influenced by the Chinese government.

(2) In representations to IPCO on 2 March 2022, his counsel said on his behalf that there is "no open source evidence that [he] is linked to the UFWD" and "[he] avers that he has no connection to the UFWD".

(3) In his witness statement of 1 June 2023 he provided only limited details of links to the UFWD, stating that in the Chinese business community some contact with the UFWD was "unavoidable". He did not disclose the sort of proximity demonstrated by the material listed above.

115. The Applicant's ability to generate relevant relationships between prominent UK figures and Chinese officials was said to be demonstrated by the following OPEN material discovered on his devices during the November 2021 port stop:

(1) A letter dated 30 March 2020 from Dominic Hampshire, a senior advisor to the Duke, to the Applicant, highlighting the strength of the relationship between the Applicant and both the Duke and Mr Hampshire and its importance to the Duke. The letter referred to the distinction of the Applicant having been invited to the Duke's birthday party that month and said: "*I also hope that it is clear to you where you sit with my principal and indeed his family. You should never underestimate the strength of that relationship. ... outside of his closest internal confidants, you sit at the very top of a tree that many, many people would like to be on*". The letter also said that since the first meeting between the Applicant, the Duke and Mr Hampshire, "*... we have wisely navigated our way around former Private Secretaries and we have found a way to carefully remove those people who we don't completely trust ... Under your guidance, we found a way to get the relevant people unnoticed in and out of the house in Windsor ...*".

(2) Another letter from Mr Hampshire to the Applicant dated 22 October 2020, confirming that the Applicant was authorised to act on behalf of the Duke on an international financial initiative known as the Eurasia Fund in engagements with potential partners and investors in China.

116. The assertion that the relationships could be used for political interference purposes by the CCP including the UFWD was said to be supported by the Applicant's links with the UFWD, his downplaying of them, what is known about the aims of UFWD and the

fact of the Applicant downplaying the strength of his relationship with the Duke, and the following OPEN material recovered from the Applicant's device in the November 2021 port stop:

(1) A document assessed to be questions asked by the Chinese Embassy about the Eurasia Fund.

(2) A document dated 24 August 2021 and headed "Main talking points for [the Duke]/[the Applicant] call" which said among other things:

"11. IMPORTANT: Manage expectations

a. Really important to not set 'too high' expectations – he is in a desperate situation and will grab onto anything

b. Key message: everything is going well; going to plan

c. Do not mention any 'big numbers' as this will create unnecessary expectation and pressure

12. Q&A:

a. If he does talk about money: 'things are going well, discussing with Dominic who will follow up'

b. If he asks about when deals are happening: 'making good progress; not immediately but in the not too distant future

13. It is better to under-promise and then over-deliver."

117. Mr Dunlop also submitted that these materials contradict the impression of distance from the Duke given in the Applicant's first witness statement (and in submissions to IPCO on 2 March 2022 where the Applicant said that his involvement with the Duke was purely a contractual matter linked to the Duke's initiative known as the C Initiative).

118. The SSHD's case overall was that this kind of relationship could be used for political interference, having regard to the aims of UFWD which include the aims of co-opting and manipulating elite individuals. Evidence of those aims was found in academic documents such as a paper on China-UK relations published by the Royal United Services Institute for Defence and Security Studies, *China-UK Relations, Where to Draw the Border Between Influence and Interference*, February 2019, which commented on tactics of interference by the CCP at page 13:

> "A major tool of interference is to create dependency on Chinese funding (or to imply that it may be withdrawn). Often this promotes self-censorship and self-limiting policies, to avoid losing financial support. Another is to get Chinese who can be trusted to advance the CCP's interests, whether in universities, the media, politics or business. A further tactic is 'elite capture', the appointing of former politicians, civil servants, businessmen, or high-profile academics/think tank personnel who retain influence in their home countries on positions in Chinese companies and think tanks or on affiliated posts in Chinese universities.

Often paid very generously for their advice, they risk becoming more amenable to CCP aims."

119. The "think tank" example, Mr Dunlop submitted, resonated with one of the documents in this case which referred to the Duke considering the creation of a think tank.

120. In reply, Mr Southey reminded us that it is for the Commission to consider whether the decision was rationally justified by the evidence relied on. The approach of L3 could be distinguished because exclusion in that case did not effectively rescind a grant of ILR, a status which brings substantial benefits.

121. In terms of specific points on the evidence, Mr Southey submitted that the OPEN evidence shows nothing more than the Applicant discharging his role in the Chinese business community. Evidence from the port stop allegedly downplaying his role or links was subject to the fact that the reporting of the interview was not verbatim. Where he used terms such as his "connection" with the UFWD there was no exploration of what that meant. The materials relating to the Duke had to be read in the context of an adviser writing to an individual who had been loyal to the Duke in difficult times. Although the "talking points" document referred to money, there was no evidence of any payment being made. Reference to the Duke considering the creation of a think tank was not evidence that this suggestion had come from the Applicant.

(4) Lack of lawful policy guidance

122. Rejecting Mr Southey's reliance on *Lumba*, Mr Dunlop submitted that the up-to-date position on the lawfulness of policies is found in the Supreme Court's decision in *R (A) v SSHD*. He submitted that this ground of challenge is therefore bound to fail.

123. Mr Dunlop also relied on *T2* (see [95] above), where it had been contended that the criteria for exclusion were not sufficiently specified in the Immigration Rules. The Commission at [56] rejected that contention, finding that the phrase "not conducive to the public good" was well understood and required no further explanation in the Rules, though it was "open to the Secretary of State to issue indicative guidance about the sorts of circumstances in which she may consider that a person's presence in the UK is not conducive to the public good".

124. Mr Southey maintained that *Lumba* is a more relevant authority than *A*, laying down requirements for the purpose of assuring that individuals will know how to direct their representations against the proposed imposition of a detriment. Where such a detriment can be imposed on individuals, a clear policy is needed, not necessarily covering every case but giving an idea of the sorts of factors which may attract action.

125. In post-hearing submissions addressing *B4 CA*, Mr Dunlop maintained that the submissions to the Secretary of State were fair and balanced. She had been given the salient facts, consistent with the terminology of Elias LJ in *R (Khatib) v Secretary of State for the Home Department* [2015] EWHC 606 (Admin) at para. 49. the Applicant knew that it was his association with the UFWD that led to his exclusion, and addressed those matters in his witness statement. Assessing the matter for itself, the Commission could be satisfied that the submissions to the Secretary of State were fair and balanced.

(5) ECHR Article 8

126. Mr Dunlop first contended that the ECHR did not apply to the Applicant at the time of either of the exclusion directions because he was not in the United Kingdom. The only exception in any reported cases, he submitted, was where a Court was reviewing a refusal of Entry Clearance at the suit of an individual who was seeking it to be reunited with a family member in the jurisdiction or to resume a private life established in the jurisdiction.

127. Mr Dunlop pointed out that the Commission need not necessarily decide the jurisdiction issue, because his alternative submission is that any interference with Article 8 rights was plainly lawful and proportionate given the significant weight to be given to the legitimate aim of protecting national security. It was hard to imagine any case based on national security in which that would not be so, and in this case the answer was obvious because the Applicant has no family in the UK and at the time of the decision under challenge was spending most of his time in China.

(6) Discrimination

128. Similar submissions were made by Mr Dunlop in relation to ECHR Article 14. There is the same potential issue about territorial jurisdiction. And even if the Applicant's enjoyment of his Article 8 rights was subject to discrimination on the ground of his nationality, that could be justified in the same way as the interference with his Article 8 rights.

129. Mr Dunlop also submitted that there was in any event no discrimination on ground of the Applicant's nationality. The reason for the exclusion directions was the threat to national security arising from his conduct.

130. The same point was made in opposition to the Applicant's reliance on section 13 and/or section 19 of the Equality Act 2010.

131. Reliance on the 2010 Act was also opposed by Mr Dunlop for other fundamental or jurisdictional reasons.

132. First, on a proper construction of section 29 of the 2010 Act, it applies only to acts done in the UK (with the exception of refusals of Entry Clearance). The Commission in *D9 v SSHD* (SC/180/2021) so held, following the approach of the Court of Appeal in *R (Turani) v SSHD* [2021] EWCA Civ 348, ruling also that although an exclusion direction was made in the UK, its effect was felt by the Applicant outside the UK.

133. Second, section 192 of the 2010 Act provides:

> "A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose."

134. Mr Dunlop relied on that provision on the basis of his more general submissions in relation to the proportionality of the exclusion direction.

135. Mr Southey maintained his position on proportionality. In answer to the territorial jurisdiction point, he submitted that if there is jurisdiction in Entry Clearance cases, there must be jurisdiction in relation to exclusion because the effect of exclusion is to prevent the grant of Entry Clearance.

(7) Public sector equality duty

136. Mr Dunlop submitted that section 149 of the 2010 Act also does not have extra-territorial effect, the Supreme Court having decided in *R (Marouf) v SSHD* [2023] UKSC 23, [2023] 3 WLR 228 that the duty under that section does not apply to bodies exercising functions affecting the lives of people living outside the UK.

137. In fact, the Home Office recommendation of 11 July 2023 nevertheless considered section 149 and advised that the direction would not have any differential impact on groups with protected characteristics.

138. In the alternative Mr Dunlop again relied on the decision having been taken for reasons other than Chinese nationality and/or on section 192.

The CLOSED material relied on by the SSHD

139. Most of the CLOSED submissions can only be addressed in the CLOSED judgment.

140. The assessment of the Applicant having been in a position to generate relevant relationships which could be leveraged for political interference purposes was supported by the CLOSED material.

The submissions of the Special Advocates

141. Jonathan Kinnear KC and David Lemer appeared as Special Advocates for the Applicant. They focused their submissions on the question of whether the SSHD had sufficient material to justify the exclusion decision such that it was not unreasonable or disproportionate.

142. The Special Advocates sought to show that when the underlying evidence is properly considered, the assessments are unreasonable, undermining the rationality and proportionality of the exclusion decision.

143. Mr Kinnear made the over-arching submission that, from the evidence in the case, it is very hard to determine precisely what "yardstick" was applied, i.e. what relevant activity by a Chinese national in the UK would be deemed deserving of exclusion. Mr Kinnear submitted that the evidence showed that the Applicant was involved in his everyday business of facilitating UK businesses to get a foothold in China or to deal with issues in China. It would be impossible for the Applicant to do business in China without having some links or contact with the CCP or UFWD. It would be unreasonable for such links or contact, by themselves, to lead to exclusion.

144. Overall, Mr Kinnear submitted that the key national security risk assessments of deliberately attempting to obscure links and of generating relationships which could be leveraged for political interference depended on conclusions that could not rationally be reached.

145. Having heard Mr Dunlop's CLOSED submissions in response to his, Mr Kinnear in reply invited us to give further consideration to Mr Southey's point about the potential relevance of Mr Hampshire's views on the nature of the Applicant's interaction with the Duke.

146. In conclusion, Mr Kinnear maintained his submission that there is no clarity as to the yardstick which was applied in this case. He submitted that that, combined with a lack of evidence, especially in relation to the assessment that the Applicant had been in a position to generate relationships that could be leveraged for political interference purposes, should lead to the conclusion that the July exclusion decision was unreasonable or disproportionate.

CLOSED submissions relating to disclosure

147. In the course of discussion in CLOSED, the Commission asked whether there was any material which it had not seen and which could explain why the Applicant was targeted for the port stop in November 2021, or otherwise addressing why his exclusion was pursued. Mr Dunlop assured us that we had seen all material that had been before the Secretary of State. We address this matter further in the CLOSED judgment.

Discussion

The nature of a section 2C review

148. In conducting a review under section 2C of the 1997 Act (a "section 2C review"), the Commission must apply the principles which would be applied in judicial review proceedings (see section 2C(3) of the 1997 Act).

149. In *Begum SC*, the Supreme Court addressed the role of the Commission in an appeal brought under section 40(2) of the British Nationality Act 1981 against a decision of the Secretary of State to deprive a person of their British citizenship. While section 40(2) proceedings concern appeals rather than reviews under section 2C of the 1997 Act, we consider that certain features of the Supreme Court's summary of the public law parameters of the Commission's role in such proceedings apply with equal measure to a section 2C review. Indeed, at paragraph 69 Lord Reed held that:

> "… the principles to be applied by SIAC in reviewing the Secretary of State's exercise of discretion [in a section 40(2) appeal] are largely the same as those applicable in administrative law…"

150. Lord Reed continued by summarising those principles in the following terms, at paragraph 71:

> "First, [SIAC] can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety… Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) 'if he is satisfied that the order would make a person stateless'. Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the

obligation arising in appropriate cases under section 6 of the Human Rights Act…".

151. That being so, neither judicial review proceedings nor proceedings on a section 2C review would ordinarily involve scrutiny of post-decision evidence or other material that was not before the decision maker at the time of the impugned decision. A judicial review court normally does not make primary findings of fact. Rather it reviews the lawfulness of a decision on the basis of the information before the decision maker when the decision was taken. When the challenge is on ground of rationality, the court will decide whether there was a rational basis for the decision but it will not substitute its view of the merits or re-take the decision for itself.

152. The Commission is able, however, to consider evidence in a section 2C review in limited circumstances. The issue arose in *T2 v Secretary of State for the Home Department* (SN/129/2016), concerning a section 2C review. A case management direction had been given by an earlier constitution of the Commission for T2 to give oral evidence in the proceedings challenging the impugned exclusion decision, albeit without stating the reasons why such evidence was permitted or the issues it went to. The Commission duly heard live evidence from T2 by video link, but, as stated at paragraph 3, it was not relevant to the issues it had to decide and nothing more was said about it. In the course of explaining why it adopted that approach, the Commission addressed the limited circumstances where such evidence would be permitted, which we set out below.

153. First, in relation to an "established" fact of the sort addressed by *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044 at (for example) paragraphs 66, 88 and 91. At paragraph 91, the Court held that unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" may give rise to a public law error, and that new evidence on such an appeal or review is subject to the principles in *Ladd v Marshall* [1954] 1 WLR 1489, which may be departed from in exceptional circumstances where the interests of justice require. See paragraph 18 of *T2*.

154. Mr Dunlop sought to confine the approach to post-decision material in *E* to human rights cases in which the decision maker has a continuing duty of review. Some support for that approach may be found in *R (A) v Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706, in particular at paragraph 78 ("these cases, however, are cases in which the decision-maker was a Minister with a continuing duty in relation to the matter").

155. In our judgment, it is by no means clear that *R (A) v Chief Constable of Kent Constabulary* sought to confine the scope of *E* in relation to mistakes concerning established and uncontroversial facts in the manner suggested by Mr Dunlop. We note that the *E* doctrine, if that is what it is, has been endorsed repeatedly, albeit in the context of emphasising its narrow scope. See, for example, *Kanhirakandan v Secretary of State for the Home Department* [2023] EWCA Civ 1298 at paragraph 50.

156. We do not, however, need to reach a settled view on the impact of *R (A) v Chief Constable of Kent* on the approach in *E*. While there is a degree of post-decision

evidence before us pertaining to the Applicant's Article 8 private life rights (in relation to which a different approach applies; see below), there is no "established" evidence of the sort which would engage the *E* head of review in relation to the Secretary of State's primary conclusions upon which the decision to exclude the Applicant is concerned, either in OPEN or in CLOSED.

157. That is entirely consistent with the approach in *T2* to the "new" evidence upon which T2 sought to rely in order to defeat the Secretary of State's conclusions about his past in those proceedings. T2 disagreed with Secretary of State's assessment that he had been a commander in a civilian militia operating alongside the Revolutionary Guard during protests surrounding the 2009 Iranian presidential elections. However, his contention that he had not performed that role was not an *established* fact. It was a *contested* fact. To that end, the Commission made the following observation at paragraph 22:

> "...we are not concerned with whether the allegation made against T2 in open was true, but whether there was evidence before the Secretary of State on which it was open to her reasonably to conclude that the allegation was true. It follows that T2's evidence to us, denying the allegation, is irrelevant."

158. It follows, therefore, that the Applicant's written evidence to us denying the allegations does not go to the central issue we are to decide. Our task, in conducting a section 2C review of the Secretary of State's decisions, is to determine whether it may be impugned by reference to the criteria summarised at paragraph 71 of *Begum SC*.

159. A second basis upon which the Commission may consider post-decision evidence is where such evidence is called in order to impugn the motives of the decision maker. See *T2* at paragraph 23:

> "...the court may hear live evidence in those relatively rare cases in which a claimant impugns the motives of a decision maker or makers and it is also necessary to make findings of fact about those motives."

160. The Applicant does not seek to rely on post-decision evidence for this purpose and we need say no more about it.

161. Mr Southey also submitted that post-decision evidence is admissible in order to demonstrate the impact of procedural unfairness, in order to demonstrate what would have happened if the claimed procedural unfairness had not infected the process adopted by the Secretary of State. This submission was based partly on *R v Secretary of State for the Environment ex parte Powis* [1981] WLR 584. Dunn LJ held at 595H that post-decision evidence may be admissible:

> "... where proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct are bias by the decision making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged..."

162. We do not consider *ex parte Powis* materially to add to the second category of post-decision evidence summarised by the Commission in *T2*.

163. Mr Southey also relied on *Sri Lalithambika Foods Limited v Secretary of State for the Home Department* [2019] EWHC 761 (Admin) at paragraph 34 per Bourne J:

> "[Counsel for the Claimant] submits that when the Court assesses the procedural fairness of the decision or aspects of it, it can have regard to more recent evidence to show what would or might have happened if, for example, the Claimant had been given a better or a different opportunity to provide evidence to answer the Defendant's concerns. I agree that evidence is admissible for that purpose, and the effect of such evidence is fact-specific."

164. In the Commission's judgment, the above extract from *Sri Lalithambika Foods Limited* merely reflected the well-established requirement to demonstrate the materiality of any alleged procedural unfairness. That principle is often traced back to *Simplex GE (Holdings) v SSE* [1998] P. & C.R. 306: see the discussion, and endorsement of the principle, at paragraphs 117 to 121 of *Begum CA*. At page 329 of *Simplex*, Staughton LJ held:

> "…where one of the reasons given for a decision is bad, it can still stand if the court is satisfied that the decision-making authority would have reached the same conclusion without regard to that reason."

165. We observe that that principle is now on a statutory footing in relation to judicial review proceedings: see section 31A(2A) to (2C) of the Senior Courts Act 1891.

166. It follows that the Court in *Sri Lalithambika Foods* did not establish a new basis of relevance for post-decision evidence in judicial review proceedings. It simply expressed the *Simplex* principle from the inverse perspective: if a respondent is able to establish that any alleged procedural unfairness would have made no difference, then so too must a claimant be entitled to demonstrate that such unfairness *did* make a difference.

The rationality and proportionality of the decision

167. It is convenient to consider the merits of the decision to exclude through the prism first of rationality, then proportionality, before going on to the other grounds of challenge.

168. The Amended First National Security Statement on behalf of the SSHD states:

> "6. The UFWD is responsible for progressing CCP 'United Front work', which President Xi Jinping described in 2014 as a 'magic weapon' for the 'Chinese people's great rejuvenation'. The CCP leadership maintains that the Chinese diaspora plays an essential role in China achieving this aim, and believes that there is an immutable 'Chineseness' among overseas Chinese communities that it can appeal to and has agency over. These individuals may also derive personal benefit from cooperating with the UFWD and its associated entities. According to Australian academic Alex Joske, 'Xi Jinping has emphasised that the United Front is about working on people' and that co-opting and manipulating elites, influential individuals and organisations is a way to shape discourse and decision making. 'United Front work' is carried out by a plethora of UFWD-linked subsidiaries, cover companies, affiliates, and associated PRC-linked organisations and is a key element of the CCP's strategy

to consolidate its hold on power, both domestically and overseas. Through these vectors, the UFWD aims to amplify pro-CCP and pro-PRC voices whilst silencing those that challenge or criticise the CCP's authority or legitimacy and has a remit to manage relations between the CCP and non-Party elements of Chinese society, both internally and overseas. The UFWD use some organisations to predominantly target the Chinese diaspora, whilst others predominantly target foreign (i.e. non-Chinese) elites and others in positions of influence – either directly or via members of the diaspora. Some states use interference activities to undermine the UK's interests.

7. On 6 July 2022, the Director General of MI5 outlined the threat posed to the UK by interference activity conducted by the Chinese State as follows: 'Obviously, much influencing activity is wholly legitimate: every country, every organisation, every business, wants to put its best face forward. The overt diplomatic activities of the Chinese Ministry of Foreign Affairs and attempts to grow China's 'soft power' are not where MI5 is focused. Where [MI5] come in is unearthing, and seeking to neutralise, what we call interference activity – influencing that is clandestine, coercive or corruptive. Where the Chinese intelligence services, or bodies within the CCP itself – such as its United Front Work Department (UFWD) and International Department – are mounting patient, well-funded, deceptive campaigns to buy and exert influence, … [The UFWD] aims to amplify pro-CCP voices – and silence those that question the CCP's legitimacy or authority. This has very real consequences here in the UK.'

8. It is assessed that [the Applicant's] links to the Chinese State, CCP and UFWD are such that he is likely aware of the aims and objectives of the 'United Front' system and the role of the UFWD in particular. It is further assessed that some of [his] past activity has furthered the aims of the UFWD. In light of these assessments, [the Applicant], having been in a position to generate relationships between senior Chinese officials and prominent UK figures, poses a threat to UK national security."

169. From that introduction and the intelligence assessments in this case, it can be seen that the SSHD's case for directing the Applicant's exclusion depends on a combination of 3 elements:

(1) he has links with the UFWD and/or CCP;

(2) he has concealed or downplayed those links; and

(3) he has formed or may form relationships between himself or senior Chinese officials and prominent UK figures which could be leveraged for political interference purposes by the CCP (including the UFWD) or the Chinese State.

170. It is important to understand that neither the first nor the third element has particular force unless it is combined with the second. The first element may apply to every Chinese businessperson. The third may be nothing more than normal business practice, coloured in some cases by a diplomatic context.

171. The real nature of the concern is that the Applicant is or may be part of a "deceptive" campaign aimed at political interference. The essence of it is the forming of relationships with one or more prominent UK figures who would not have formed those relationships if they had known the reality of the Applicant's links to the UFWD and/or CCP. The second element is therefore indispensable.

172. The introductory paragraphs 6 and 7 which we have quoted above represent a statement of UK foreign policy and intelligence assessment at a high level. It is not for the Commission to question or go behind that statement. We therefore accept, for example, that the UFWD is operating in the manner described and that this is contrary to the UK's interests.

173. It is in that context that we must consider the evidence relating to the Applicant.

174. Beginning with the first element, in our judgment it was reasonably open to the SSHD to conclude that the Applicant has links with the UFWD and CCP.

175. That conclusion draws rational support from OPEN material. The letter to Zhou Kairang, list of delegates including his name and text message referring to the Applicant's CPPCC role demonstrated some degree of interaction or willingness to interact with the UFWD.

176. The concealment or downplaying of that evidence, to which we return below, is itself also logically consistent with the evidence being significant. Viewed alongside the other evidence of concealing CCP links to which we return below, it supports the view that there were links which the Applicant thought worthy of concealment.

177. Overall, there is not an abundance of evidence of the UFWD links and in our view, the question of whether there were sufficient links to be regarded as significant was finely balanced.

178. However, that falls well short of a finding that there was no rational basis for the conclusion of significant links.

179. Turning to the second element, we also consider that there was a rational basis for the conclusion that the Applicant had attempted to conceal or downplay his UFWD/CCP links. Whilst again there was not an abundance of evidence, we consider the evidential basis for this element of the decision to be somewhat stronger.

180. In OPEN evidence, the Applicant made statements denying UFWD links which can rationally be viewed as misleading when compared with the evidence of such links to which we have referred. There is a logical inconsistency between the links, discussed above, and claims that he had no connections to anyone in politics in China (November 2021 port stop interview), that he "has no connection to the UFWD" (representations to IPCO) or that his connections were merely of the "unavoidable" kind (first witness statement). The links disclosed in his witness statement of 1 June 2023 were less extensive than those revealed by the evidence to which we have referred.

181. The CLOSED material logically justifies the conclusion that the Applicant has concealed his links with the CCP for the reasons set out in the CLOSED judgment.

182. There is therefore a rational basis for the second element of the assessment.

183. Turning to the third element, we also consider that there was a rational basis for the conclusion that the Applicant had been in a position to generate relationships with prominent UK figures which could be leveraged for political interference purposes by the CCP (including the UFWD) or the Chinese State.

184. That conclusion essentially depends on the Applicant's relationship with the Duke and certain features of that relationship. The letters from Mr Hampshire justify the conclusion that the Applicant won a significant degree, one could say an unusual degree, of trust from a senior member of the Royal Family who was prepared to enter into business activities with him. That occurred in a context where, as the contemporaneous documents record, the Duke was under considerable pressure and could be expected to value the Applicant's loyal support. It is obvious that the pressures on the Duke could make him vulnerable to the misuse of that sort of influence.

185. That does not mean that the SSHD could be expected to exclude from the UK any Chinese businessman who formed a commercial relationship with the Duke or with any other member of the Royal Family. But the SSHD decided, and in our judgment was rationally entitled to decide, that there was potential for "leveraging" such a relationship when it was formed by an individual who (1) had significant links to the UFWD/ CCP and (2) was not candid about those links and took steps to conceal them.

186. To make out the third element, it is not strictly necessary to show that the relationship with the Duke was of a particularly confidential nature. It was however logical, in our judgment, for those making the assessment to regard the concerns as being heightened by evidence of the relevant activity having a covert nature. References in Mr Hampshire's letter of 30 March 2020 to "obsessive confidentiality", to "navigating around" the Duke's Private Secretaries and to getting people "unnoticed in and out of the house in Windsor" may genuinely have had the innocent explanations which have been put forward, but the Secretary of State was entitled to conclude that they did not. There does also appear to have been some downplaying of the nature of the relationship. The description in the Applicant's witness statement of business meetings relating to A Ltd's role in the activities of the C Initiative in China, with the Applicant having no private meetings with or direct access to the Duke of any kind, creates a different impression from the letter of 30 March 2020.

187. We accept that the SSHD is entitled to take a reasonable precautionary approach when assessing risk, and that in this case there was and is evidence to support a rational perception of risk.

188. It has been repeatedly recognised that the Commission will give appropriate deference to the assessments of the security services and the SSHD because of their institutional competence in these areas and because of the SSHD's democratic accountability.

189. In this case, we have referred above to the possibility that there may be other evidence which has not been placed before the Commission. That leads us to be somewhat cautious in our consideration of the national security assessment, because MI5 may have assessed a wider picture than the one before us. Nevertheless, in its documentation for this case, MI5 has made specific reference to the material which is before the Commission, and has advised the SSHD that that material shows that the Applicant

poses a risk to UK national security. We are bound to recognise M15's institutional competence in expressing that opinion.

190. So far as the SSHD is concerned, we rely on counsel's assurance that the Commission has seen all the material which was before the SSHD. That being so, we accord the SSHD's decision the appropriate degree of respect for the reasons explained in *Begum SC*.

191. For the reasons we have explained, we reject the contention that the SSHD's July exclusion decision was irrational.

192. We also reject the contention that the July exclusion was not proportionate for the purposes of domestic law.

193. In that regard, it is important to distinguish between the strength of the evidence — i.e. its quality and quantity – and the seriousness of the feared harm.

194. In our judgment, as we have said, there was not an abundant quantity of evidence to make out all 3 of the elements which justify the decision, and we have already identified areas in which evidence could have had an innocent explanation. We consider that that part of this case is finely balanced.

195. However, we have concluded that the evidence was sufficient to justify the conclusion of a national security risk. Once that point was reached, the need for protective action was to be judged on the basis of the type and gravity of the risk, and not just on the quality of the evidence which had led to that assessment. The SSHD was entitled to view the risk to national security as being of very considerable importance.

196. In our judgment it was open to the SSHD to take a reasonably precautionary approach to the risk, and to take action rationally aimed at neutralising it so far as possible. Whilst excluding the Applicant would not necessarily halt his activities, it would significantly hinder them. Cultivating relationships with prominent UK individuals would logically be much more difficult if no meetings could take place in the UK.

197. We therefore conclude that the exclusion direction was a proportionate means of pursuing the legitimate aim of protecting national security and was in accordance with the SSHD's policy.

Fair procedure and the *Tameside* duty

198. Grounds 1 and 2 are essentially different facets of the same overall procedural fairness-based criticism. We will approach them together, addressing the following matters:

    (1) whether fairness required the Secretary of State to seek the Applicant's representations prior to taking the March decision;

    (2) whether any unfairness in the March decision was cured by the July decision;

(3) whether the Authority to Carry scheme would have provided an effective pre-exclusion alternative while representations from the Applicant were sought;

(4) whether any prior representations by the Applicant would have made a difference in any event;

(5) whether it was unfair for the Secretary of State not to disclose certain OPEN, formerly CLOSED, material to the Applicant at an earlier stage;

(6) the extent, if any, to which the Secretary of State's Tameside duty obliged her to seek Mr Hampshire's view's prior to taking either exclusion decision; and

(7) whether the decision was fair and balanced.

(1) Whether fairness required the Secretary of State to seek the Applicant's representations prior to taking the March decision

199. At one level, this facet of ground 1 may be dealt with briefly. the Applicant did, in fact, enjoy the ability to make representations prior to the operative decision under challenge being taken. He made representations in response to the March decision. The decision was withdrawn and the July decision was taken, the Secretary of State having had the benefit of considering the Applicant's written representations, including his witness statement dated 1 June 2023. Any unfairness arising from not seeking the Applicant's representations ahead of the March decision would have been cured by the July decision.

200. That is not a complete answer to Mr Southey's submissions, however. Mr Southey submitted that the March decision itself should not have been taken without obtaining prior representations from the Applicant. He also submitted that, in any event, the Applicant's ability to make meaningful representations ahead of the July decision was so limited as to have amounted to procedural unfairness. For his part, Mr Dunlop contends that no duty of prior consultation arose.

201. It is therefore necessary resolve these issues to determine whether fairness required representations to be sought from the Applicant *before* the Secretary of State took the March decision.

202. The requirements of procedural fairness are context-specific. The principles were summarised in the following well known passage in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531. At page 560, having summarised the authorities, Lord Mustill said:

> "From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be

> taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case that he has to answer."

203. In *Begum CA*, the Court considered whether representations should have been sought ahead of a decision to deprive the appellant of her British citizenship under section 40(2) of the British Nationality Act 1981 ("the 1981 Act"). It addressed that question in the first instance as a question of statutory construction, asking itself "whether Parliament has by necessary implication excluded a right to prior representation", construing the legislative regime by reference to its express provisions, context and purpose (paragraphs 104 and 105). At paragraph 106, the Court held that one of the main purposes, if not *the* main purpose, of section 40(2) of the 1981 Act was to protect the public from a threat to national security, and held that a requirement to seek prior representations could frustrate that purpose. The Court endorsed the approach of the Commission in *B4 v Secretary of State for the Home Department* (SC/159/2018) ("B4 SIAC"), also in the statutory context of the deprivation of citizenship, where it was held, at paragraph 138:

> "The general rule in national security cases is that there is no duty to seek representations before making the deprivation order. This is because the very act of seeking representations would be contrary to the national security of the UK: the individual would take immediate steps to return, in the knowledge of what was about to happen."

204. The description of this principle as "a general rule in national security cases" was endorsed at paragraph 107. We also observe that nothing in the Commission's reasoning on the issue of prior notification was impugned by the Court of Appeal in *B4 CA*.

205. There are of course differences between an exclusion decision of the sort under challenge in these proceedings and a deprivation decision taken under section 40(2) of the 1981 Act. Those differences include the source of the power (which is implied rather than express, as we observe above), its effect once exercised (to exclude a person subject to immigration control from the UK, rather than to deprive a British citizen of their British citizenship) and the route of challenge (a section 2C review rather than an appeal under section 2B of the 1997 Act, if certified by the Secretary of State). However, properly understood those differences are immaterial to the issue of whether prior representations are necessary in the interests of procedural fairness in a national security case. Both powers are concerned with preventing an individual assessed to pose a risk to the national security of the United Kingdom from entering or returning to the United Kingdom (we accept that there may be some in-country decisions taken

under section 40(2), but that does not materially affect our analysis for present purposes). The risk of tip-off is present in both contexts. The effectiveness of either measure in protecting the national security interests of the United Kingdom will turn on whether the individual concerned is prevented from returning to or entering the United Kingdom by virtue of the implementation of the decision. That being so, the factors which led the Court in *Begum CA* to conclude that there was no requirement to seek prior representations in those proceedings apply with equal measure in these proceedings. We therefore consider that paragraph 138 of *B4 SIAC*, quoted above, would be capable of equal application in a section 2C review if for the words "deprivation order" were substituted the words "exclusion order":

> "The general rule in national security cases is that there is no duty to seek representations before making the **exclusion** order. This is because the very act of seeking representations would be contrary to the national security of the UK: the individual would take immediate steps to return, in the knowledge of what was about to happen."

206. Contrary to Mr Southey's submissions, we do not consider that the above general principle is qualified by anything Underhill LJ said at paragraph 60 of *Balajigari*. The extract upon which Mr Southey placed particular reliance came in the second half of the paragraph, which in fuller context than quoted above reads:

> "…Another rationale [for seeking prior representations] is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch. 550 at p. 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming 'unduly fixed' before representations are made. He said:
>
> > 'any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals – before the mind of the executive becomes unduly fixed.'"

207. We reject this submission for the following reasons.

208. First, Underhill LJ expressly qualified the guidance he gave in paragraph 60, stating:

> "… unless the circumstances of a particular case make this impractical, the ability to make representations only *after* a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness."

209. In our judgment, a national security exclusion is the paradigm example of where "the circumstances of a particular case make [it] impracticable" to seek representations. Paragraph 60 was not addressing national security decisions. The guidance at paragraph 60, consistent with the well-known extract from *ex parte Doody*, does not establish an immutable, identical process to be followed by rote in every case. There are exceptions to the general approach at paragraph 60 of *Balajigari*. This case is one such exception.

210. Second, exclusion decisions are to be taken by the Secretary of State personally. Barring a change in the holder of that office from time to time, there is no other person who would be entitled take an exclusion decision. Taken to its logical conclusion, therefore, this aspect of Mr Southey's submission would mean that the Secretary of State would be unable to review a decision she had taken personally. The Secretary of State's ability to take decisions concerning the national security of the United Kingdom would effectively be reduced to a single-use power which would be incapable of being reviewed – even by the Secretary of State personally – in light of subsequent representations or developments.

(2) Whether any unfairness in the March decision was cured by the July decision

211. We consider that this facet of ground 1 is founded on a false premise, namely that the March decision was infected by procedural unfairness. We do not consider that it was. As explained above, no unfairness arose from the Applicant not having the opportunity to make representations prior to the March decision. The Secretary of State has not conceded that that decision involved an error of law. The Applicant made representations in response to it. The Secretary of State considered those representations and re-took the decision. The fact that the decision was re-taken was hardly surprising. There was a large amount of additional material of which the Secretary of State did not have the benefit when taking the March decision. Reviewing the decision and re-taking it was an entirely rational course that was open to the Secretary of State. It was not a concession that the March decision was unlawful.

(3) Whether the Authority to Carry scheme would have provided an effective pre-exclusion alternative while representations from the Applicant were sought

212. We accept Mr Dunlop's submissions that the ATC scheme does not sufficiently guard against the risks arising from the potential for tipping off a potential excluded person such that the scheme's existence militated in favour of seeking representations ahead of the March decision. Nor does an ATC decision attract the consequences provided for by Part 9 of the Immigration Rules which attach to an exclusion decision taken by the Secretary of State, namely the cancellation of any leave to remain held by the subject and the mandatory refusal of future applications for entry clearance. In our judgment, as a matter of principle, if the Secretary of State's assessment is that the national security interests of the United Kingdom require an individual to be excluded by the personal decision of the Secretary of State (with the ensuing automatic revocation of any existing leave and the prospective mandatory refusal of any entry clearance applications), it is no answer that a lesser form of operational exclusion could potentially provide a degree of protection on an interim basis, pending a full exclusion decision by the Secretary of State. Settling for a lesser form of protection would be inimical to the interests of national security in circumstances where, as here, the Secretary of State has concluded that a person's exclusion is required on conduciveness grounds in the interests of national security.

213. We also consider that Mr Southey's submissions on this issue are somewhat self-defeating. To the extent that the ATC scheme is effective to prevent a prospectively excluded individual from boarding transport to the United Kingdom, then such a decision would, on Mr Southey's submission, be taken without the opportunity for prior

representations from the individual concerned. The very procedural unfairness that Mr Southey contends would be solved by the use of the ATC scheme would, in fact, infect that process in precisely the same way.

214. Moreover, if Mr Southey's submission were taken to its logical conclusion, the key event in the chronology of an individual's exclusion would *not* be a personal exclusion decision taken by the Secretary of State acting on advice, coupled with formal notification requirements and the prospect of a review by this Commission if certified by the Secretary of State, but rather an administrative decision taken by officials concerning the ATC scheme which would not be subject to the same notification requirements, nor benefit from the institutional competence or democratic accountability which attaches to an exclusion decision taken by the Secretary of State personally. Those disadvantages would be in addition to the operational effectiveness of the ATC scheme being inferior to that of a full exclusion decision.

215. Thus, the approach for which Mr Southey contends would lead to the worst of both worlds. The Secretary of State would be unable to take timely exclusion decisions in the interests of national security and would have to settle for a lesser alternative pending a full exclusion decision, and the target of the exclusion decision would be subject to an operational decision taken by officials without any of the benefits that flow from the Secretary of State taking the decision personally, nor the prospective oversight of this Commission. We therefore find that resorting to the ATC scheme was not an alternative so preferable as to render the process adopted in these proceedings unfair.

(4) Whether any prior representations by the Applicant would have made a difference in any event

216. We can deal with this point briefly.

217. First, the Applicant did enjoy the ability to make representations ahead of the July decision. Those representations were considered, leading to the March decision being withdrawn and replaced by the July decision. The July decision reached the same conclusion as the March decision. That renders this criticism academic.

218. Second, such evidence is only admissible to the extent that a procedural irregularity or other public law error infected the decision-making process adopted by the Secretary of State: see *Simplex* at page 329. Our analysis above (and below in relation to the *Tameside* point) demonstrates that the procedure adopted in relation to the Applicant was fair. The question of the Applicant being able to demonstrate that an alternative outcome would have been possible had he not been the victim of procedural unfairness simply does not arise.

219. Third, the post-decision evidence that the Applicant has provided in the context of these proceedings has been considered by the Secretary of State in any event. She has maintained her decision. We have considered that evidence for ourselves, out of an abundance of caution. As summarised above, the accounts that the Applicant provided in the OPEN evidence, combined with the remaining OPEN and CLOSED evidence, rationally entitled the Secretary of State to conclude that the Applicant (i) has links with the CCP and/or the UFWD; (ii) has downplayed, or concealed, such links; and (iii) has formed or may form relationships between himself or senior Chinese officials and

prominent UK figures which could be leveraged for political interferences purposes by the CCP (including the UFWD) or the Chinese State.

220. Drawing this analysis together, no unfairness arose on account of the Applicant not having the opportunity to make representations prior to the March decision being taken.

(5) Whether it was unfair for the Secretary of State not to disclose certain OPEN, formerly CLOSED, material to the Applicant at an earlier stage

221. We reject Mr Southey's submission that L3 was wrongly decided.

222. In section 2C of the 1997 Act, Parliament contemplated that exclusion directions would be subject to review by the Commission. The SIAC procedure rules provide for decisions to be taken in a measured way to determine what material will be in OPEN and what will be in CLOSED. We accept that, in the first instance, the SSHD has a wide discretion when deciding what information to make available to a person who is subject to an exclusion direction, and is entitled to exercise that discretion in a precautionary way. Other than disagreeing with the conclusions of Johnson J in *L3*, Mr Southey proffered no reasoned basis for this constitution of the Commission to depart from it and we decline to do so.

223. There was no unfairness, in our judgment. The Secretary of State, with the benefit of the special advocates' submissions, accepted that certain CLOSED material could be disclosed to the Applicant. Disclosure subsequently took place. The Applicant now has the benefit of that material (much of which was seized from him in the first place). That is how the process is intended to work. It was not unfair. We adopt the approach taken in *L3* at paragraph 75.

(6) The extent to which, if at all, the Secretary of State's Tameside duty obliged her to seek Mr Hampshire's views prior to taking either exclusion decision

224. The allegation of a failure by the SSHD to make all necessary enquiries boils down to the question of whether the SSHD was bound to seek further information from Mr Hampshire about the Applicant's relationship with the Duke. Applying the *Wednesbury* standard, we reject the contention that the SSHD was bound to make such an enquiry.

225. Paragraph 70 of *Balajigari* approved Haddon-Cave J's summary of the general principles of the *Tameside* duty in *R (Plantagenet Alliance Limited v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paragraphs 99 to 100. They are as follows:

(1) The obligation upon a decision maker is only to take such steps to inform itself as are reasonable.

(2) Subject to a Wednesbury challenge, it is for the decision maker, and not the court, to decide upon the manner and intensity of inquiry to be undertaken.

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable decision maker could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.

(4) The court should establish what material was before the decision maker and should only strike down a decision by the decision maker not to make further inquiries if no reasonable decision maker possessed of that material could suppose that the inquiries it had made were sufficient.

(5) The principle that the decision maker must call its own attention to considerations relevant to its decision, a duty which in practice may require it to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the Applicant, but from the decision maker's duty to inform itself so as to arrive at a rational conclusion.

(6) The wider the discretion conferred on the decision maker, the more important it must be that it has all relevant material to enable it properly to exercise that discretion.

226. We agree with Mr Dunlop that it cannot be said that the only rational course open to the Secretary of State was to contact Mr Hampshire for his views concerning the prospective exclusion of the Applicant. This is for two reasons.

227. The first is that a prior approach to Mr Hampshire may well have resulted in the message getting back to the Applicant that his exclusion was being considered. In turn, that could have defeated the object of the exclusion decision for reasons largely similar to those justifying not seeking prior representations from the Applicant himself, as set out above. It cannot be said that it would have been reasonable to approach Mr Hampshire in such circumstances, still less that the Secretary of State's decision not to do so was *Wednesbury* unreasonable. Nothing in the *Tameside* duty obliges the Secretary of State to act contrary to the interests of national security.

228. The second is that, with respect to Mr Hampshire, it is difficult to see how any such enquiries could have illuminated any of the three limbs of the Secretary of State's case for pursuing the Applicant's exclusion, bearing in mind the Secretary of State's institutional competence and expertise in matters relating to national security. The three limbs of the OPEN case against the Applicant, developed in CLOSED, were formulated on the basis of advice from relevant officials, acting with the benefit of the institutional expertise of their relevant departments. The March and July decisions were taken by those with specialist expertise in their fields. Such assessments were based on finely balanced judgements concerning the Applicant's risk profile and the prospective consequences of him leveraging his role and relationships for the purposes of political interference on behalf of China. Moreover, the Secretary of State now has the benefit of Mr Hampshire's witness statement dated 24 May 2024. Mr Dunlop confirmed that Mr Hampshire's statement has been reviewed. The Secretary of State's exclusion decision has been maintained.

229. For those reasons, the Secretary of State's *Tameside* duty did not extend to seeking more information from Mr Hampshire at any stage in the process.

(7) Whether the decision was fair and balanced

230. Having reviewed the OPEN and CLOSED material which was before the Secretary of State at the time of both decisions, we consider that the advice preceding the March and July decisions was fair and balanced. It addressed all relevant considerations. Both submissions drew the salient points to the decision-maker's attention. They referred to relevant extracts of all inculpatory material of which the Commission is aware, and addressed mitigating factors in the Applicant's favour. In our judgment, on the basis of the material available to us, we have determined for ourselves that the process adopted, and the advice to the Secretary of State, was fair and balanced.

231. Grounds 1 and 2 are therefore without merit.

The different approach in human rights cases

232. Where the ECHR is engaged, a different approach to post decision evidence may apply. In such cases, the Commission must decide for itself whether the decision under challenge is unlawful under section 6 of the Human Rights Act 1998 ("the 1998 Act"). Such an assessment may entail consideration of post-decision evidence. In performing that assessment, however, there remain "narrow limits on [the Commission's] institutional capacity to review the Secretary of State's assessment of the interests of national security" (*Secretary of State for the Home Department v P3* [2021] EWCA Civ 1642 at paragraph 97, per Laing LJ). While the Commission may determine for itself the proportionality of any interference with a qualified right guaranteed by the ECHR, in doing so it cannot substitute its own evaluation of the interests of national security for that of the Secretary of State. As Laing LJ put it in *P3*, also at paragraph 97:

> "The starting point for an assessment of proportionality is that the Secretary of State's assessment goes into one side of the balance, unless it is susceptible to criticism on one of the ways described in *Rehman*."

233. The reference to *Rehman* was to *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153. The permissible scrutiny to which Laing LJ adverted is that summarised at paragraph 71 of *Begum SC*, to which we have referred above.

234. Contrary to the submissions of Mr Southey, we do not consider the above approach to be called into question by *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505. *Abortion Services* is not authority for the proposition that the Commission must conduct its own, full merits review of all issues relevant to the question of proportionality. The issue in *Abortion Services* was whether an offence to be created by the Abortion Services (Safe Access Zones) (Northern Ireland) Bill involved a disproportionate interference with the Convention rights of protesters outside abortion centres. The Court contrasted the approach to be taken when scrutinising the overall Convention-compatibility of a legislative regime as a whole, on the one hand, with the appellate review of a case-specific proportionality decision taken by a first instance judge, on the other: see paragraph 33, in relation to the decisions under challenge in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911. The Court continued at paragraph 33 that the approach to be adopted in such appellate proceedings is for the court to intervene if the lower court's assessment of proportionality was "wrong". That was an approach that was

capable of being applied flexibly, "since the test or standard applied in deciding whether a decision is wrong can be adapted to the context."

235. That does not imply any departure from the *Rehman*, *Begum* and *P3* approaches to the assessment of the proportionality of an interference with a protected right on national security grounds, where the Commission assesses for itself the proportionality of any interference with ECHR rights but places the Secretary of State's national security case into one side of the balance. Her institutional competence in relation to matters of national security is part of the relevant context to which the test must be adapted, whether by the Commission or indeed by any Court hearing a future appeal from our decision.

236. In our judgment, even taking the post-decision evidence at its highest, we do not consider the Applicant's exclusion to be disproportionate for the purposes of the ECHR, for the reasons set out below.

237. We conduct our analysis on the footing that the decision to exclude the Applicant did engage his Article 8 private life rights. We reject Mr Dunlop's submissions on this issue, in particular his attempts to distinguish *Ali v Upper Tribunal (Immigration and Asylum Chamber)*. While the facts of *Ali* were unique, the underlying premise of the Court of Appeal's analysis in relation to the engagement of Article 8 was, in our respectful judgment, uncontroversial and was not restricted to the facts of the proceedings before it. The appellant in *Ali* was a formerly resident, settled migrant. Circumstances beyond his control, namely lost travel documentation, prevented his return to the United Kingdom as planned following what had been intended to be a temporary absence. The length of his unintended absence was such that he was required to obtain entry clearance to return to the United Kingdom, but he was unable to obtain the correct replacement travel documentation from the Entry Clearance Officer or the Secretary of State to enable him to apply for entry clearance in order to resume the private life he had previously enjoyed here. The First-tier Tribunal held that Article 8 was not capable of being engaged on a private life basis, relying on *Abbas v Secretary of State for the Home Department* [2017] EWCA Civ 1391. *Abbas* concerned whether Article 8 was engaged on a private life basis where a non-settled migrant sought entry clearance in order to establish a private life in the United Kingdom.

238. The Court in *Ali* distinguished *Abbas* on the basis that that case did not concern the position of a settled migrant seeking to re-enter the United Kingdom in order to resume a previously established private life. Andrews LJ observed at paragraph 46, referring to *Khan v United Kingdom* (2014) 58 EHRR SE15, that:

> "*Khan v United Kingdom* indicates that a person's private life may be engaged for the purposes of an Article 8 claim if they are excluded from the United Kingdom by the cancellation of their leave to remain whilst they are outside the jurisdiction."

239. The Court summarised its conclusion on this issue at paragraph 47:

> "If someone is a settled migrant, then the actions of the state in removing them, cancelling their leave to remain, or refusing them leave to re-enter all have an

impact on their established private life within the territory of the state which is sufficient for the purposes of Article 1."

240. We do not consider these central propositions to be affected by the unique facts of *Ali's* case. It is also nothing to the point that *Ali* concerned a refusal of entry clearance, rather than exclusion. The Court plainly had in mind the consequences of a decision that was coterminous with exclusion. That much is clear from the reference to "cancelling their leave to remain", which, of course, is one of the consequences of a decision of the Secretary of State to make an exclusion order. The underlying theme of the Court's analysis in *Ali* was that Article 8 is, in principle, capable of being engaged on a private life basis in out of country cases. The unique facts of *Ali* may well be relevant to the substantive, merits-based assessment of the appeal upon its determination by the Upper Tribunal (see for example, paragraphs 60 and 63), but there can be no suggestion that similarly extreme facts are required for the simple *engagement* of Article 8 in other out of country cases.

241. Applying those principles to the present case, the Applicant previously enjoyed a private life in the United Kingdom. He has settled status, a home and extensive business interests in the United Kingdom. He was regarded as a close confidant of the Duke. While prior to his exclusion he split his time between the UK, China and elsewhere, we consider that his private life was sufficiently established in the United Kingdom for Article 8 to be engaged on a private life basis by his exclusion.

242. We also consider that the decision to exclude the Applicant will have consequences of sufficient gravity so as to engage the operation of Article 8.

243. Such interference would be in accordance with the law, in the sense that it would be conducted pursuant to an established legal framework, coupled with the potential for an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002, or to this Commission under section 2 of the 1997 Act, as the case may be. The decision would, in principle, be capable of being regarded as necessary in a democratic society on the grounds of one of the derogations permitted under Article 8(2).

244. We turn now to the question of whether any interference with the Applicant's Article 8 private life rights would be proportionate. We conclude that it would be, for the following reasons.

245. Any such interference with the Applicant's private life rights was of a fairly limited degree. At the time of the decision the Applicant lived in China and had not visited the UK for some time. Even before the Covid pandemic when he visited the UK regularly and maintained a second home here, he nevertheless spent less than half of his time in this country. While here, he engaged in business and connected social activities but he had no family life in the UK.

246. We have explained why a valid decision was reached that his activities in the UK posed a risk to national security. That being so, interference with his limited private life in this country (in a manner which we have found was proportionate for domestic law purposes) was obviously a proportionate means of pursuing the legitimate aim of countering the national security risk.

Policy guidance: whether the decision was unlawful because of the absence of guidance or other source of law specifying the circumstances in which the Secretary of State's exclusion power would be exercised

247. We commence with two preliminary observations. First, it is important to recall that a section 2C review is a challenge to an individual decision taken by the Secretary of State. Lewis LJ's preliminary observation at para. 59 of *Northumbrian Water* applies with equal measure here: the issue for our consideration is whether the Secretary of State's exercise of discretion to exclude the Applicant was lawful. That is a question to be determined by reference to established principles of public law. Those principles are addressed above. It is important to distinguish a challenge to an individual exercise of discretion from a challenge to the broader operational policy within which the decision was taken. We accept that, in principle, if a discretionary decision was taken pursuant to an unlawful policy (or the unlawful absence of a policy), that would be a factor which could go to the lawfulness of the individual decision under challenge.

248. Second, the Secretary of State *has* adopted a published policy concerning the use of her exclusion powers: *Exclusion from the UK* (see para. 68, above). This is not, therefore, a case where the Secretary of State's exercise of her discretionary exclusion power is wholly "at large", unencumbered by any operational or policy guidance. Nor is it a case where such a policy, if it exists at all, has not been published. Properly understood, and on a fair reading of this ground, Mr Southey's submissions must be that the Secretary of State's existing policy is insufficiently prescriptive or specific lawfully to permit the use of the power to exclude in the present circumstances. Drawing on Mr Southey's reliance on para. 34 of Lord Dyson's judgment in *Lumba*, this ground must also be that the version of *Exclusion from the UK* in force at the time of the impugned decisions was insufficiently *transparent*, such that the Secretary of State's decisions to exclude the Applicant were unlawful.

249. We reject this submission for the following reasons.

250. First, we agree with Mr Dunlop that the Supreme Court's judgment in *R (A)* is dispositive of this ground against the Applicant. Lord Reed held at para. 46 that a policy would be unlawful by reason of giving guidance on the law when (1) it includes a positive statement of law which is wrong and which will induce a person who follows it to breach their legal duty in some way, (2) where it is under a duty to provide accurate advice about the law but fails to do so or (3) where it purports to provide a full account of the legal position but fails to do so. None of those applies to the policy in the present case. Lord Reed also said at [39] that there is often no obligation in public law for an authority to promulgate any policy or, if it decides to do so, for it to take the form of a "detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court".

251. Second, we reject Mr Southey's submission that *R (A)* may be distinguished from *Lumba* because it did not address the use of statutory immigration powers of the sort under consideration in that case. The issues in *Lumba* concerned the lawfulness of decisions to detain foreign national offenders taken under a pre-existing, unpublished policy. The issues also concerned whether a blanket policy was in place, and whether there was an effective presumption in favour of detention (see para. 10). Those who

were detained pursuant to the unpublished policy were unable to make meaningful representations pertaining to their release from detention for they were unaware of the (secret – and strict) criteria adopted by the Secretary of State to effect their detention. Detainees would have been under the misapprehension that representations concerning their release made under the terms of the published policy would be considered under that policy. Accordingly, *Lumba* primarily concerned the need for the publication of a pre-existing policy, rather than the need to adopt a policy and the extent of any policy's prescriptiveness, once adopted. Lewis LJ summarised the position in the following terms, at para. 60 of *Northumbrian Water*:

> "The decision does not establish that there is a common law duty to adopt a policy setting out the criteria governing the exercise of discretion."

252. It was against that background that Lord Dyson spoke at para. 34 of *Lumba* of the need for a "transparent statement" of the circumstances in which broad statutory criteria will be exercised. The concealment of an unpublished operational policy which provided for the effective blanket detention of foreign national prisoners in circumstances admitting of very few exceptions was anathema to such transparency. This point is also clear from *Northumbrian Water*; see para. 61 of Lewis LJ's judgment.

253. Third, nothing in *Northumbrian Water* confines the approach taken by the Court of Appeal to its facts. In his post-hearing submissions to us, notwithstanding that he contended that *Northumbrian Water* was wrongly decided, Mr Southey contended that his *Lumba*-based submissions were consistent with *Northumbrian Water*. This, he submitted, was because *Northumbrian Water* was confined to its facts. We reject this submission. The principles underlying the analysis of Lewis LJ at paras 58 to 68 of *Northumbrian Water* are plainly of general application.

254. Fourth, *Northumbrian Water* does not aid Mr Southey's attempt to extrapolate from *Lumba* a requirement for public authorities to articulate a policy in all cases where its exercise exposes an individual to some "penalty or detriment". First, *Lumba* was not a case about the adoption of a policy, for the reasons set out above. Second, the Supreme Court's reference to "penalties or other detriments" at para. 36 was in the context of holding that the Court of Appeal had wrongly distinguished between the publication of policies to an individual's benefit and those which were to an individual's detriment. The Supreme Court held that that was "not a satisfactory ground of distinction" when addressing the need to publish a policy. Lord Dyson went on to say:

> "The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits…"

255. While the *Exclusion from the UK* guidance unquestionably concerns the "penalties or other detriments" facing the prospective targets of exclusion decisions, it has been published. Nothing in para. 36 of *Lumba* supports this aspect of the Applicant's case.

256. As observed above, Mr Southey's submission concerning the need for a "transparent statement" of the circumstances in which the Secretary of State will exercise her exclusion power should properly be understood as a challenge to the terms of the *Exclusion from the UK* policy, rather than a challenge concerning the existence or publication of any such policy.

257. In the present case, the complaint is that the examples in the policy document were of no real assistance to the Applicant or his representatives. He was left, in effect, with the proposition that his exclusion was (in the words of section 2C) "conducive to the public good", and that this was for the reasons identified to him by the SSHD. None of that meant that the reasons for his exclusion were obscure, or that he was impeded in addressing them in his representations.

258. In view of the nature of the interference activity by the Chinese state which was identified by the Director General of MI5 on 6 July 2022, as quoted above, the section of the SSHD's policy document *Exclusion from the UK* which deals with national security now seems rather dated (in both of the versions which have been shown to us). National security is only one of several areas covered by the document, and that section is focused on terrorism.

259. Nevertheless, although we consider that the document would benefit from updating, that is a long way from a finding that the policy is unlawful, still less that the March and July decisions taken pursuant to it were unlawful. The reasons why individuals may be excluded from the UK, and risks to national security generally, are protean, ever changing. We accept that it would not be reasonable to expect a policy document to anticipate all forms in which they may occur. At best such a policy document may give some illustrative examples, as this one does.

260. Some parallels may be drawn with the approach taken by Lewis LJ in *Northumbrian Water*. Lewis LJ held that it was not necessary for Ofwat to have adopted a policy that indicated in advance the circumstances in which it would decide to grant an exemption from liability to water suppliers in situations of civil emergency. See para. 46:

> "The rarity of supply interruptions resulting from a civil emergency, and the range of circumstances that might need to be considered in whether, and to what extent, to grant an exception are, however, likely to vary. It cannot be said that there is any common law obligation to adopt a policy in those circumstances."

261. Just as the circumstances in which a civil emergency may justify absolving a water company from the adverse consequences that would otherwise attach to the interruption of supplies to its customers are likely to vary, so too are the requirements of protecting national security.

262. We also consider that a requirement to prescribe in advance all circumstances in which the exclusion power will be appropriate, even if it were possible to do so, would effectively make the articulation of a sufficiently detailed policy a condition precedent to the exercise of the Secretary of State's exclusion power. The common law does not serve to fetter the executive exercise of discretion in that way. This point was made in *Northumbrian Water* in the following terms, at para. 66:

> "...that is to allow the absence of a policy to dictate, or limit, the considerations that may be taken into account when exercising the discretion in a way not contemplated on a proper interpretation of Condition B of the licence..."

263. We also observe that in the field of national security, there may be very real concerns arising from publicly articulating the detail of perceived threats arising from foreign

interference in the UK in a manner that would have captured the specifics of the Applicant's conduct in these proceedings.

264. It is against that background that we address Mr Kinnear's "yardstick" submission. This submission, in our judgment, more accurately articulates what we understand Mr Southey's submissions in OPEN to mean: that it was difficult for the Applicant to judge for himself how his actions would be received by the United Kingdom, in the absence of a sufficiently clear policy addressing the sort of conduct which may be considered for exclusion.

265. To address this submission, we recall our analysis above that the Secretary of State was rationally entitled to conclude that the Applicant had engaged in conduct which was capable of being regarded as not conducive to the public good. Pursuant to *R (A)*, the Secretary of State is not subject to any requirement proactively to specify in advance how the exclusion power would be exercised, even assuming it would be possible accurately and satisfactorily to do so. The absence of a previously identified yardstick against which to scrutinise the Applicant's conduct is not a matter which renders the individual exercise of discretion under the March and July decisions unlawful.

266. Drawing this analysis together, we return to where we began. A section 2C review is a review of an individual exercise of discretion on conventional public law grounds. It is not a challenge to the operational policy pursuant to which the decision in question was taken. The broader operational policy framework may be relevant if impugned on public law grounds. As set out above, however, neither the Applicant nor the special advocates have succeeded in establishing that that operational policy framework was unlawful, still less that the March or July decisions taken within that framework were unlawful.

267. That conclusion deals with the final fairness-based facets of the Applicant's case. The Secretary of State took decisions she was entitled to reach. Those decisions were consistent with the broad discretion she enjoys to exclude persons from the United Kingdom on conduciveness grounds. The process was fair, in that the Applicant was given the opportunity to make representations. The March decision was withdrawn following the Applicant making further representations, leading to the July decision. The July decision was lawful on conventional public law grounds, for the reasons set out above. The policy guidance ground is without merit.

Discrimination

Article 14 ECHR

268. We accept that the March and July decisions were within the ambit of Article 8, largely for the reasons given above concerning the engagement of Article 8. Accordingly it is, in principle, open to the Applicant to seek to rely on Article 14 of the ECHR.

269. We find that there has been no breach of Article 14 read with Article 8. The reason the Applicant has been targeted for exclusion is not his Chinese citizenship. It is because he has been assessed to be a threat to the national security of the United Kingdom, for the reasons accepted above. There is no evidence of direct nationality discrimination. the Applicant has been targeted for exclusion on the three bases outlined above, none

of which necessarily entail being a citizen of China, and each involves a careful, fact-specific analysis of the Applicant's individual circumstances.

270. Nor do we accept that the Secretary of State's decision indirectly discriminates against the Applicant as a Chinese citizen. Any "provision, criterion or practice" consisted of not tolerating certain objectively illegitimate conduct. Whilst the foreign policy advice, referred to above, is that China has engaged in such conduct, that does not mean that objecting to the conduct puts any Chinese individual "at a particular disadvantage" when compared with other individuals, because there would be no legitimate reason for such an individual to engage in that conduct.

Equality Act 2010

271. We accept Mr Dunlop's primary submission that the 2010 Act is not engaged by the decision to exclude the Applicant since he is outside the territorial jurisdiction of the United Kingdom and, accordingly, the scope of the 2010 Act. We are persuaded by, and adopt, the approach of the Commission at paragraphs 74 and 75 of *D9*, itself relying on *Turani*.

272. We reject Mr Southey's submissions that *D9* was wrongly decided. We see no reason to depart from the reasoning of the Commission in *D9* and every reason to conclude that it was entirely consistent with *Turani*. *Turani* concerned a challenge to an *ex gratia* scheme for the settlement of refugees fleeting the conflict in Syria, and the exclusion from its scope of Palestinian refugees protected by the UN Relief and Works Agency. An issue arose as to whether the operation of the *ex gratia* scheme outside the United Kingdom engaged section 29(9). In summary, *Turani* held that the meaning and scope of section 29(9) is a question of statutory construction. There is a general presumption against extraterritoriality. "The public" referred to in section 29(1) and (6) is the same, and those subsections have the same territorial extent. Section 29(9) necessarily applies to the refusal of entry clearance and other matters integral to such decisions. The Court held that the *ex gratia* scheme did not operate outside and independently of the Secretary of State's entry clearance powers, and decisions taken pursuant to the scheme to exclude an applicant on eligibility grounds engaged section 29(9). But the establishment of the *ex gratia* scheme itself was not a grant of entry clearance; it was an exercise of prerogative powers to make a policy about how statutory immigration powers will be exercised. See paragraphs 57 to 68.

273. At paragraph 58 of *Turani*, Simler LJ observed that section 29(9) expands the territorial scope of section 29 "to the granting of entry clearance". She contrasted that formulation with the oft-used "relating to" formulation found elsewhere in the Act:

> "The words 'relating to' (which are used to refer to the protected characteristics in question) or other similar words (such as 'in connection with the grant of entry clearance') could have been but were not used in referring to the grant of entry clearance."

274. The terminology of the Act distinguishes between activities with a less direct connection to the conduct in question ("relating to"), on the one hand, and "the granting" of entry clearance, on the other. Consistent with *Turani* and *D9*, we conclude that that distinction is effective to extend the extraterritorial scope of section 29 in

relation to "*the granting* of entry clearance" (and refusal of the same), but not in relation to matters anterior to, and wholly distinct from, the granting of entry clearance. An exclusion decision taken personally by the Secretary of State is not "the granting of entry clearance", and is not caught by the extraterritorial scope of section 29(9).

275. This conclusion is not altered by Part 9.2.1.(a) of the Immigration Rules. If anything, Part 9.2.1.(a) underlines the distinction between an exclusion direction given personally by the Secretary of State and the treatment of any subsequent application for entry clearance by an excluded person. It is not the Secretary of State's exclusion decision that mandates the refusal of any future application for entry clearance by the Applicant; it is Part 9.2.1.(a) of the Immigration Rules. The Immigration Rules themselves are not the decision of the Entry Clearance Officer. While the Secretary of State's direction for the exclusion of the Applicant means that any future application for entry clearance he makes will be refused in accordance with Part 9.2.1.(a) (subject to the Secretary of State's discretion to grant entry clearance or leave outside the rules), we consider that that prospective future possibility, triggered only in the event that an application for entry clearance is made and considered, renders an exclusion direction too remote to amount to "the granting of entry clearance" for the purposes of section 29(9).

276. The Applicant has not applied for entry clearance. Still less has any application been refused. If he does make such an application, section 29(9) will extend the operation of that section to the determination of that application, and he will, in principle (subject to the discussion of section 192 of the 2010 Act, below), enjoy the benefit of section 29(9) at that stage.

277. We do not consider that *Ali v Upper Tribunal* affects this conclusion. *Ali* was about whether Article 8 ECHR was capable of being engaged on a private life basis by a returning resident seeking to continue a previously established private life. It did not concern the territorial scope of a wholly domestic provision, still less section 29(9) of the 2010 Act. The fact that the exclusion decision may affect the Applicant's private life in the United Kingdom is incapable of expanding the scope of section 29(9).

278. Even if section 29(9) did extend the scope of section 29 to the Secretary of State's exclusion decisions, we do not consider that there is evidence, direct or indirect, of discrimination against the Applicant. Acting on a national security threat posed by a particular individual does not amount to discrimination, either direct or indirect.

279. Finally, and in any event, even if the 2010 Act was engaged, section 192 would operate to exempt the exclusion decision from any prohibition against discrimination imposed by the Act. Our analysis concerning grounds 1 to 4 establishes that the Secretary of State was entitled to conclude that the Applicant represented a risk to the national security of the United Kingdom, and that she was entitled to conclude that his exclusion was justified and proportionate. That is, in reality, a complete answer to any 2010 Act-based complaint.

Public sector equality duty

280. We can deal with this ground swiftly. It is without merit.

281. First, the mandatory due regard principle contained in section 149(1) of the 2010 Act is "primarily directed at policy decisions, not at the application of policy to individual cases" (see *R (Marouf) v Secretary of State for the Home Department* [2023] UKSC 23; [2023] 3 WLR 228 at paragraph 62, per Lady Rose JSC).

282. Second, the Applicant's exclusion was pursued because he represents a national security risk and not on grounds of a protected characteristic under the 2010 Act, either directly or indirectly.

283. Third, section 149 is not extraterritorial in application or effect. Contrary to Mr Southey's submission, paragraph 52 of Lady Rose's judgment in *Marouf* did not envisage the possibility of the extraterritorial application of the section 149 duty. Paragraph 52 is only capable of being read in that way if the remaining analysis in the judgment is disregarded. That construction would mean that Parliament had intended to oblige domestic public bodies to have due regard to the need to improve an individual's position in an overseas community. As Lady Rose noted at paragraph 66, that was not a construction for which the appellant had contended. It would be surprising if by virtue of a single sentence reflecting the factual matrix of the proceedings (namely the appellant having no connection to the United Kingdom) Lady Rose had sought to endorse an extraterritorial construction of section 149(1) which was not only at odds with the remainder of her judgment, but which was a construction for which even the appellant did not contend.

284. Fourth, the Secretary of State addressed the section 149(1) duty in (identical) terms that were open to her, at paragraphs 6 and 9 of the March and July OPEN submissions respectively:

> "The relevant HO team do not consider that your duties under section 149 Equality Act 2010 require you to take account of any additional information. Whilst a decision to continue to exclude [the Applicant] will have an impact on him, this decision is due to the assessment that his presence in the UK poses a risk to national security. Furthermore, this decision is applicable only to [the Applicant] and would therefore not have a differential impact on groups with protected characteristics."

285. Finally, the national security exemption contained section 192 of the 2010 Act is engaged on the facts of this case for the reasons given above.

286. This ground is therefore without merit.

Anonymity order

287. By an order dated 15 May 2023, the Chairman of SIAC made an order for the Applicant's anonymity. By an order dated 27 November 2024 we lifted that order with effect from 12 December 2024. On 11 December 2024, the Divisional Court granted interim relief to the Applicant in relation to the Commission's order of 27 November 2024, and ordered that his anonymity, and existing reporting restrictions, must be maintained until (i) a rolled-up hearing before the Divisional Court; or (ii) the resolution of any application to, or appeal before, the Court of Appeal, with consequential directions. The Applicant therefore continues to benefit from the order for anonymity

made by the Chairman on 15 May 2023. This decision features redactions necessary to give effect to that order to prevent the jigsaw identification of the Applicant. We have used ciphers to refer to A Ltd, B Ltd, and the C Initiative in order to prevent such jigsaw identification.

Conclusion

288. The application is dismissed.